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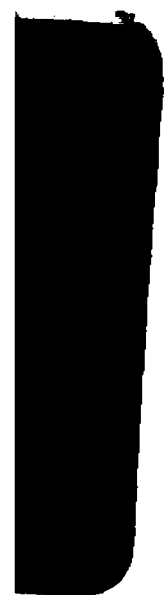
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DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE
COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN.

VOLUME 121.

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BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
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AMERICAN STATE REPORTS.

VOLUME 121.

(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

CITY OF MOBILE v. PHILLIPS.

[146 Ala. 158, 40 South. 826.]

LICENSES, Two or More on the Business of the Same Person.—
A charter provision that no more than one license shall be assessed or collected from persons doing business under a firm name does not prohibit the exaction from an individual or firm of a license for carrying on the business of a retail dealer in beer and another license for carrying on business as a wholesale dealer in the same article. (p. 18.)

INTERSTATE COMMERCE.—A license may be exacted from a person selling beer by the barrel, half barrel, or quarter barrel, though he purchases it in another state, whence it is shipped to him into this state and it remains in the kegs in which he receives it. (p. 19.)

Prosecution for selling beer by the barrel without first taking out a license. The defendant resided in Mobile, Alabama, and was engaged in selling beer by retail, and had taken out the license required of one conducting such business. He was also engaged at the same time in the business of buying and selling beer in kegs. These he ordered by letter or telegram from brewers, situate and doing business in other states, who thereupon shipped them to the defendant by a continuous line of transportation, and they were received in Mobile and generally paid for on arrival, but not until after the receipt of the bill of lading. The kegs received were of the ordinary commercial size and were in the usual course taken by the defendant from the cars and stored in the warehouse, and the deliveries for sales made by him of the beer were in the same kegs in which it was received. The trial court refused to instruct the jury in favor of the plaintiff, but on the contrary, directed it to

return a verdict for the defendant, and the plaintiff appealed.

B. B. Boone, for the appellant.

Fitts & Stout, for the appellee.

¹⁶¹ WEAKEY, J. The appellee was engaged in the business of a retail beer dealer in Mobile, and had taken out his license as such retail dealer for 1904. This prosecution was instituted against him for a violation of the license ordinance of said city, in that he had sold beer by the barrel without first taking out a license from the city to carry on such business, for which, by another section of the ordinance, a license was required.

It is contended for appellee that section 43 of the charter of Mobile (Acts 1901, p. 2347 et seq.) operates to exempt him from taking out a license for selling beer by the barrel, etc., because he had already obtained a license as a retail beer dealer. We think there is no ¹⁶² merit in this contention. The section of the charter relied on provided "that not more than one license under this act shall be assessed against or collected from partners trading or business done under a firm name." Appellee was enjoying two separate privileges, and, unless some other valid reason may be found to exempt him, should procure a license for each. The section quoted was intended merely to authorize a partnership or firm business, in which several persons are interested, to be conducted upon payment of one license.

The other question for consideration is whether, under the facts agreed on, the license tax is a regulation of or imposition upon interstate commerce, and invalid under the commerce clause of the constitution of the United States, and upon this question the decisions of the supreme court of the United States are paramount authority. We do not deem it necessary to review the decisions of that court upon the question involved, or similar questions, nor will we undertake to analyze or harmonize them. The comparatively recent cases of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538, and *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. Rep. 403, 49 L. ed. 663, in each of which the court was unanimous, have led to a clearer understanding of the true distinction between the two cases, and will enable other courts with more accuracy

to determine whether, under a given state of facts, there has or has not been imposed by the state or a municipal subdivision thereof an unconstitutional imposition or burden upon interstate commerce. It must be held upon the authority of *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. Rep. 403, 49 L. ed. 663, and the authorities therein cited, that appellee was carrying on an independent domestic business, for which the city of Mobile had the right to require the prepayment of a license tax. Indeed, this is a stronger case for the city than the one just cited. Our own cases of *State v. Agee*, 83 Ala. 110, 3 South. 856, *Keith v. State*, 91 Ala. 2, 8 South. 353, 10 L. R. A. 430, and *Stratford v. City Council of Montgomery*, 110 Ala. 619, 20 South. 127, which were rested upon decisions of the supreme court of the United States referred to in the opinions, are not similar to this, nor in conflict with the conclusion here reached. If they are ¹⁶³ read in connection with the two leading cases first above cited, the lines of demarcation will be apparent.

The city court erred in giving the affirmative charge for appellee. It should have been given for the city of Mobile. Reversed and remanded.

Tyson, Simpson, and Anderson, JJ., concur.

From the Judgment of the Supreme Court of Alabama, a writ of error was prosecuted to the supreme court of the United States, resulting in an affirmance. The opinion by Mr. Justice Peckham, after stating the facts, was as follows:

“The plaintiff in error asserts that a license tax, such as is provided in this ordinance, is a tax upon the seller of the goods under the license, and therefore a tax upon the goods themselves (*Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. Rep. 403, 49 L. ed. 663), and, as they were brought into the state from another state, they cannot be taxed in their original packages, even under the Wilson act: 26 Stats. at Large, 313, c. 728; U. S. Comp. Stats. 1901, p. 3177. The ordinance, it is said, is in the nature of a revenue act, and was not enacted in the exercise of the police powers of the state through the city. The Wilson act provides that the liquors, upon arrival in a state or territory to which the liquor may be sent, shall be subject to the operation and effect of the laws of the state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

“It is insisted that Congress, by the passage of the Wilson act, merely removed the impediment to the states reaching the inter-

state liquor through the police power, and that it intended to, and did, keep in existence any other impediment to state interference with interstate commerce in original packages.

“But we are of opinion that this section of the ordinance was clearly an exercise of the police power of the state, and, as such, authorized by the act of Congress. The fact that the city derives more or less revenue from the ordinance in question does not tend to prove that this section was not adopted in the exercise of the police power, even though it might also be an exercise of the power to tax. The police power is a very extensive one, and is frequently exercised where it also results in raising a revenue. The police powers of a state form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which may be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for the regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass: *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *New York City v. Miln*, 11 Pet. 102, 9 L. ed. 648; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923.

“The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it. We regard the question in this case as covered in substance by prior decisions of this court: See *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. Rep. 674, 42 L. ed. 1100; *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 21 Sup. Ct. Rep. 201, 45 L. ed. 269; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. Rep. 552, 49 L. ed. 925; *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. Rep. 447, 51 L. ed. 724. Even where the subject of transportation is not intoxicating liquor, this court has held that goods brought in the original packages from another state, having arrived at their destination, and being at rest there, may be taxed, without discrimination, like other property within the state, even while in the original packages in which they were brought from another state: *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538.

“This license tax is exacted without reference to the question as to where the beer was manufactured, whether within or without the state, and hence there is no discrimination in the case.

"It is unnecessary to continue the discussion. As we have said, the cases above cited are conclusive in favor of the correctness of the judgment of the supreme court of Alabama.

"Judgment affirmed": Phillips v. City of Mobile, 208 U. S. 472, 28 Sup. Ct. Rep. 370, L. ed.

WARE v. MOBILE COUNTY.

[146 Ala. 163, 41 South. 153.]

INTERSTATE COMMERCE, Business Which is not.—The business of brokers of making contracts to buy and sell future cotton for customers is not interstate commerce. Such contracts are not articles of commerce. (p. 23.)

INTERSTATE COMMERCE—License Exacted for Dealing in Futures.—A license exacted of brokers who are engaged in buying and selling grain and cotton for future delivery, taking orders in Alabama, to be executed on the exchanges in New York or New Orleans, is not imposed on interstate commerce, where the contracts in which brokers deal do not contain any stipulation requiring the seller to ship the cotton or grain to any point without the state, though, as a matter of fact, such shipments are sometimes made by the seller. The subsequent shipment cannot become interstate commerce until the articles commence to be transported. (p. 24.)

Action to recover of the defendants a license tax for the year 1903 for engaging in the business of buying and selling futures on commission in the city of Mobile, Alabama. The case was submitted on an agreed statement of facts, with a stipulation that, if the business done by the defendant was interstate commerce and the license a tax thereupon, it constituted an unlawful interference, and the defendants were entitled to a verdict.

B. B. Boone, for the appellant.

R. H. and N. R. Clarke, for the appellee.

¹⁶⁸ TYSON, J. Subdivision 40 of the act "to better provide for the revenue of the state" (Gen. Acts 1903, p. 207) reads as follows: "For each person engaged in the business of buying and selling futures for speculation or on a commission either for themselves or for other persons, and each place of business commonly known as cotton exchanges, or stock exchanges and sometimes called 'bucket shops' in towns and cities of twenty thousand inhabitants or more,

five hundred dollars; in all other towns and cities, two hundred and fifty dollars; but this shall not be held to legalize any contract which would otherwise be invalid." It appears from the agreed statement of facts, upon which the case was tried, that during the whole of the year 1903 defendants conducted the business in the city of Mobile, a city of more than twenty thousand inhabitants, of buying and selling cotton for future delivery on commission, for the public generally and for special customers. The local agent in the city would take the order of those desiring to buy or sell future cotton contracts, which would be executed by defendants upon the New York or New Orleans cotton exchange; the customer at the time of giving the order, depositing with the local agent a sum of money as margin to protect the defendants against loss in the event the course of the market was adverse to the side of the customer. When the order was given, it was not usual to say anything about an actual delivery of the cotton; but defendants furnished the customer with a memorandum reserving the right to close the transaction when the margin deposited was about exhausted and to settle the contract in accordance with the rules and customs of the exchange on which the order was placed. This ¹⁶⁹ memorandum also contained the stipulation that "in all trades actual delivery is contemplated," and the further stipulation that "all purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and contracts of the exchange on which the order is placed," etc. The order of the customer was then transmitted by wire by defendants to their office in the city of New York or New Orleans, where it was executed. The contract thus purchased or sold, as the case may be, was held by defendants for the buyer or seller, their customer, until the same was ordered closed out, which was done by buying or selling another contract against it, as might be necessary to cover or close it out, or receive or deliver cotton on the contract. If a profit was made in the transaction, it was remitted by defendants from their office where made to the Mobile office and there paid over to the customer. If a loss was incurred, it was taken by the Mobile office out of the customer's margin, and if that was insufficient to pay the loss, the customer was called on for the balance. No actual delivery of cotton was ever made on such contracts, except in a few instances, and then at the place of its execution, to

wit, New York or New Orleans. When the cotton was delivered on a contract of purchase, it was held by defendants for the purchaser, as his agents, until they were ordered to sell it. When the delivery was made upon a contract of sale, the seller would ship the cotton from Alabama to New York or New Orleans, the place of delivery, and the defendants, as his agents, would there deliver it to the buyer.

The only question presented for our consideration is whether the business thus shown to have been engaged in by defendants was interstate commerce, and therefore not subject to the license tax sought to be collected of them; for clearly, if the business is not subject to be taxed, although the one for which defendants are here sought to be made liable may be characterized as an occupation tax, there can be no recovery in this case: *Stratford v. City Council of Montgomery*, 110 Ala. 619, 20 South. 127. But the defendants' business of making contracts of buying and selling future cotton for their customers is not interstate commerce. Indeed, these ¹⁷⁰ contracts are not articles of commerce at all: 17 Am. & Eng. Ency. of Law, 2d ed., p. 61. As was said by the supreme court of the United States in *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, in speaking of policies of insurance: "These contracts are not contracts of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states": See, also, *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. Rep. 962, 44 L. ed. 1116. This principle, we think, clearly controls in this case, and its application to the facts makes the defendants liable. The contracts entered into by defendants for their customers, if discharged by the payment of differences in the market values, though executed in another state by and through their agents, the defendants, are clearly not articles of commerce; and the transaction was not different from one that the customer himself in person executed the order on the

exchange in New York or New Orleans. Nor is it of consequence, in so far as the question here is involved, that the contracts were sometimes discharged by the delivery of the cotton. While it is true the cotton may have become an article of interstate commerce, it never became an article of trade from one state to another until it began to move, and this movement did not begin until the cotton was shipped or was started for transportation from one state to the other: *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. ed. 346.

There was no stipulation shown in the agreed statement of facts which required the seller to ship cotton from any point. He was at liberty to acquire the cotton in the market of delivery or elsewhere; hence a shipment from one state to another for delivery under the contract would not be interstate commerce by virtue ¹⁷¹ of the contract, but by subsequent and independent act of the seller, and the shipment in that event would not become interstate commerce until the cotton had commenced to be transported. The case of *Stratford v. City Council*, 110 Ala. 619, 20 South. 127, relied upon by appellants, clearly has no application. In that case *Stratford* was a broker, representing several nonresident wholesale dealers in grain and provisions who lived and carried on their business in other states, and every order for goods from local merchants received or obtained by him was forwarded to his principal, subject to the approval of such principal; and if the order was accepted by the nonresident dealer, he shipped the goods from his place of business to the purchaser, who did business in the city of Montgomery.

Affirmed.

Weakley, C. J., Simpson and Anderson, JJ., concur.

This Case and Another were Taken to the Supreme Court of the United States on writs of error, wherein the judgments were affirmed in an opinion by Mr. Justice Day, as follows:

“These cases were submitted together, and are in all respects similar, and involve the constitutional validity of subdivision 40 of an act of the legislature of Alabama imposing license taxes, ‘to better provide for the revenue of the state’; General Acts, 1903, page 207, which reads as follows:

“ ‘For each person engaged in the business of buying and selling futures for speculation or on commission, either for themselves or for other persons, and each place of business commonly known as cotton exchanges, or stock exchanges, and sometimes called ‘bucket

shops," in towns and cities of twenty thousand inhabitants or more, five hundred dollars; in all other towns and cities, two hundred and fifty dollars; but this shall not be held to legalize any contract which would otherwise be invalid.'

"In case No. 173 the action was brought by Mobile county for the recovery of the defendants' license tax for the year 1903, for engaging in the business of buying and selling futures on commission for other persons in the city of Mobile. The other case (174) was an action by the state. Plaintiffs recovered in the circuit court and both judgments were affirmed by the supreme court: 146 Ala. 163, 41 South. 153.

"The cases were submitted upon an agreed statement of the facts as follows:

" 'During the whole of the year 1903 defendants had an office in the city of Mobile, in the county of Mobile and state of Alabama; they also had offices in the city of New York in the state of New York, and in the city of New Orleans in the state of Louisiana, and in the city of Chicago in the state of Illinois, each of which offices was connected by private telegraph wires with the said Mobile office. Said Mobile, Alabama, office was in the charge of their agent, one Robbins, and was engaged in the business of buying and selling cotton for future delivery, on commission, for the public generally and for special customers, said business being conducted in the following way and in no other way: They would undertake, through their agent, to buy or sell a cotton future contract for a customer in the cotton exchange in New York or in New Orleans, as he might select, he making at the time a deposit of money with them as a margin to protect them against loss in making such transaction for him. When the customer gave the order to Ware & Leland, either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about an actual delivery of the cotton, but when the transaction was commenced by a purchase or sale of the cotton Ware & Leland would immediately furnish to the customer a memorandum thereof, partly written and partly printed, upon which the following stipulations were printed: "On all marginal business, we reserve the right to close transactions without further notice when margins are about exhausted, and to settle contracts in accordance with the rules and customs of the exchange on which the order is placed, it being understood and agreed in all trades that actual delivery is contemplated"; and "All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the exchange on which the order is placed, and the rules, regulations and requirements of the board of managers of said exchange, and all amendments that may be made thereto." Such agent would thereupon transmit such order by their private telegraph line to the defendants' office in the city without the state of Alabama selected for such transaction; that such order would be thereupon executed by defendants by the purchase or sale, as directed.

of a future cotton contract for such customer in the cotton exchange of the city to which such order was sent, and subject to the rules and regulations of such cotton exchange, which rules and regulations may be introduced in evidence by defendants in this cause; that said contract would be held by defendants for such customer until he ordered the same closed out, when they would sell or buy another cotton contract against it as might be necessary to cover the same or close it out, or receive or deliver the cotton on said contract. If a profit was made on the transaction defendants remitted the same to its agent in Mobile, who paid it over to the customer; if a loss was made, it was taken by the agent out of the customer's margin, or if that was insufficient therefor, the customer was called on for the balance. Said business was done on a commission paid defendants by the customers.

“ ‘No actual delivery of cotton or grain was ever made on any such contracts, except in a few instances, when such deliveries were made where the contracts were executed, to wit: in New York, New York, or in New Orleans, Louisiana, or Chicago, Illinois. When any such delivery of cotton was made to defendants for the customer on a purchase by him, it was held by the defendants for account of the customer at the place of delivery, either New York, New York, or in New Orleans, Louisiana, until ordered sold by the customer, and was then sold by them there for the account of the customer, and the proceeds accounted for by them to such customer. When they made delivery of cotton on a sale of futures made by them for a customer, the cotton was shipped by the customer for whom such sale was made from Alabama to the place of sale and there delivered through defendants to the buyer.

“ ‘A similar future grain business was done by defendants at their said office in Mobile, Alabama, for customers through their office in Chicago, in the state of Illinois—said orders being executed on the Chicago, Illinois, board of trade, and subject to its rules and regulations, which contemplated and provided for the actual receipt or delivery of grain bought or sold therein—such delivery to be made in Chicago, Illinois.

“ ‘During the whole of the year 1903 said city of Mobile, Alabama, was a city of more than twenty thousand inhabitants.

“ ‘Defendants paid to plaintiff a license tax of one hundred dollars for doing such business in said city for the year 1903, which payment was made prior to the fourth day of March, 1903; they have not paid any further license tax to plaintiff for doing such business in said year.’

“ ‘Upon the trial of the action, in addition to the foregoing agreed facts, the counsel for the plaintiff admitted that the rules and regulations of the New York cotton exchange, New Orleans cotton exchange, and Chicago board of trade, respectively, provided ‘that contracts executed therein should be in writing; and also provided that in every cotton or grain contract for future delivery, executed and

entered into in said exchange or board of trade, it should be stipulated, agreed, and understood that an actual receipt and delivery of the cotton or grain was to be had, and that said contracts were transferable and assignable.'

"The sole question here presented is whether the statute in question is an attempt to regulate interstate commerce; for, if the plaintiffs in error are shown by the foregoing agreed facts to be engaged in interstate commerce, then the statute is void, as an attempt by a state to regulate the commerce which the constitution of the United States places within the exclusive control of federal authority.

"Interstate commerce must be such as takes places between states, as differentiated from commerce wholly within a state. It must have reference to interstate trade or dealing; and if the regulation is not such, and comprehends only commerce which is internal, the state may legislate concerning it. In each case the recurring question is, On which side of the line does the commerce under investigation fall?

"It is unnecessary to review the former decisions of this court, as that has been done in very recent cases, such as the Lottery Case (*Champion v. Ames*), 188 U. S. 321, 23 Sup. Ct. Rep. 321, 47 L. ed. 492, where it was held that the transportation of lottery tickets was interstate commerce, and, as such, subject to regulation by act of Congress. In that case the federal act prohibiting the transmission of lottery tickets was sustained because of the actual carriage in interstate traffic of the tickets themselves; and, in concluding the opinion of the majority of the court, Mr. Justice Harlan said:

"The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that, under its power to regulate commerce among the several states, Congress—subject to the limitations imposed by the constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.'

"And in *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, 32 L. ed. 311, 2 Inters. Com. Rep. 134, it was held that a telegraph company whose business is the transmission of messages from one state to another, invested with the powers and privileges conferred by Congress, could not be compelled to pay a license tax by the state. And in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708, it was held that interstate telegraphic communications, conducted by companies organized for that purpose, was commerce

within the regulating power of Congress. The Pensacola case was affirmed in *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, in which case Mr. Chief Justice Waite, speaking for the court said, page 464: 'A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods.'

"While the general principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between citizens of different states, or by the agent of a company in another state, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect interstate trade.

"As in the cases involving insurance policies, it has been held that issuing them in one state and sending them to another, to be there delivered to the insured upon payment of premium, is not a transaction of interstate commerce: *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297, 5 Inters. Com. Rep. 610; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. Rep. 962, 44 L. ed. 1116.

"In *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, Mr. Justice Field, delivering the opinion of the court, said:

" 'Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent to the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia, by a citizen of New York whilst in Virginia, would constitute a portion of such commerce.'

"In *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297, 5 Inters. Com. Rep. 610, it was said:

" 'If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any

way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against "the perils of the sea."'

"These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a state by a person employed to solicit for them in another state, the goods to be shipped from the one state to the other, is interstate commerce: *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694, 1 Inters. Com. Rep. 45; similar cases are *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. Rep. 159, 51 L. ed. 295, and *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. Rep. 229, 47 L. ed. 336. In these cases goods in a foreign state are sold upon orders for the purpose of bringing them to the state which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject matter of the dealing is goods to be shipped in interstate commerce; to be carried between states and delivered from vendor to purchaser by means of interstate carriage.

"But how stands the present case upon the facts stipulated? The plaintiffs in error are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign state, the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers.

"These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and

within the regulating power of Congress. The Pensacola case was affirmed in *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, in which case Mr. Chief Justice Waite, speaking for the court said, page 464: 'A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods.'

"While the general principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between citizens of different states, or by the agent of a company in another state, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect interstate trade.

"As in the cases involving insurance policies, it has been held that issuing them in one state and sending them to another, to be there delivered to the insured upon payment of premium, is not a transaction of interstate commerce: *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297, 5 Inters. Com. Rep. 610; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. Rep. 962, 44 L. ed. 1116.

"In *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, Mr. Justice Field, delivering the opinion of the court, said:

" 'Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent to the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia, by a citizen of New York whilst in Virginia, would constitute a portion of such commerce.'

"In *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297, 5 Inters. Com. Rep. 610, it was said:

" 'If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any

way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against "the perils of the sea." "

"These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a state by a person employed to solicit for them in another state, the goods to be shipped from the one state to the other, is interstate commerce: *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694, 1 Inters. Com. Rep. 45; similar cases are *Bearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. Rep. 159, 51 L. ed. 295, and *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. Rep. 229, 47 L. ed. 336. In these cases goods in a foreign state are sold upon orders for the purpose of bringing them to the state which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject matter of the dealing is goods to be shipped in interstate commerce; to be carried between states and delivered from vendor to purchaser by means of interstate carriage.

"But how stands the present case upon the facts stipulated? The plaintiffs in error are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign state, the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers.

"These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and

office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce.

“We are of the opinion that the supreme court of Alabama correctly held that the transactions of the plaintiffs in error were not interstate commerce, and the judgments in both cases are affirmed”: *Ware & Leland v. Mobile County*, U. S. 28 Sup. Ct. Rep. 526, L. ed.

SOUTHERN RAILWAY COMPANY v. PATTERSON.

[148 Ala. 77, 41 South. 964.]

CARRIERS, Duty of to Persons Assisting Passengers.—A carrier owes a duty to persons who come upon a train accompanying passengers with an intention of getting off before the train starts, and if the conductor knows of the person so accompanying a passenger, he is bound to give such person a reasonable time to alight before starting, and if, after the train is started, such person alights and, in doing so, is injured, his act of alighting is not contributory negligence, and the carrier is answerable for the damages suffered. (p. 31.)

RAILWAYS—Notice to Conductor of Purpose of Person Assisting a Passenger, What Sufficient.—If a person boards a railway train for the purpose of assisting an old lady who is nearly blind, and, before doing so, tells the conductor of her condition and need of assistance to get upon the train and to secure a seat, and is requested by the conductor to assist her, the company is chargeable with notice of the purpose of such person, that he did not intend to become a passenger, and would seek to alight from the train. (p. 32.)

Humes & Speake, for the appellant.

James A. Bilbrow, for the appellee.

78 TYSON, J. The plaintiff received his injuries from a fall caused by stepping from one of the defendant's passenger trains while moving. It was shown both by the averments of the complaint and his testimony that he had boarded the train for the purpose solely of assisting an old lady, who was nearly blind, at her instance and request, to take passage upon it; and before he could locate her in a seat the train began to move out of the station. According to the averments of the complaint and his testimony, he told the conductor in charge of the train, before boarding it of the old lady's condition and of her need of assistance

to get upon the train and to secure a seat, and was requested by that officer to perform that service. It is undoubtedly the law that "a carrier owes a duty to persons who come upon a train accompanying passengers, with the intention of getting off before the train starts or for the purpose of meeting passengers who are about to alight. And especially is there such a duty when the passenger requires assistance which the servants of a carrier do not undertake to render. But if the servants of the carrier have no notice or knowledge of the intention of one thus coming on board to get off before the starting of the train, they owe him an additional duty as to affording him an opportunity ⁷⁹ to safely alight": 6 Cyc. 615. But where the conductor of the train knows or should have known that the only purpose of the person assisting a passenger, needing assistance to board the train, is to assist the passenger to a seat, he is bound to give such person a reasonable opportunity to alight before starting it. And if, after the train is started, the person alights from it, and is injured, and his act of alighting is not under such circumstances as to make him guilty of contributory negligence, he is unquestionably entitled to recover the damages suffered by him: *Louisville & N. R. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31; *Galloway v. Chicago, R. I. & P. Ry. Co.*, 87 Iowa, 458, 54 N. W. 447; *Evansville & T. H. R. Co. v. Athon*, 6 Ind. App. 295, 51 Am. St. Rep. 303, 33 N. E. 469; Wood on Railroads, sec. 305, p. 1297, and note 2; 2 Redfield on the Law of Railways, p. 280; 4 Elliott on Railroads, sec. 1578, p. 2458; note, 29 Am. St. Rep. 54.

Mr. Elliott in his work cited above says: "There is some diversity of opinion as to whether one who enters a train for the purpose of assisting a passenger is to be regarded as a passenger, and there are cases which seem to hold that such a person is a passenger. We are unable to assent to this doctrine as broadly held by some of the cases, for it seems to us that the extraordinary duty of a carrier to a passenger is not, as a general rule, owing to such a person, although we have no doubt that the railroad company owes to him the duty of exercising ordinary or measurable care. There may probably be cases where a person assists a passenger on a train, as, for instance, where the passenger is ill, feeble, too young to care for himself or the like, where it is proper to hold that the person needing the assistance

is a passenger, but where there is no reason for rendering assistance the person giving it cannot, as we believe, be regarded as a passenger." We think the distinction here pointed out by the learned author is well taken. The illustration given by him of the condition of the person taking passage rendering it necessary to have an assistant to help him safely board or get off the train, brings such an assistant, rendering the requisite service, within the category with respect to the duty owing ⁸⁰ by the carrier of a passenger, and where injury is suffered by such an assistant at the hands of the carrier in performing the service assumed by him, whether assumed at the instance of the passenger or the servant of the carrier whose duty it was to render it, in the absence of all explanation, the law presumes it was the result of the carrier's fault, and casts upon the latter the burden of overcoming the presumption, or of showing that diligence and a careful observance of duty could not have prevented the injury.

We fully concur in the view that the duty of the conductor not to start the train never arose in this case unless he knew or ought to have known that the plaintiff's sole purpose in going on it was to assist the lady to a seat. But we think the circumstances shown were such as to afford the reasonable inference that he did know or ought to have known that plaintiff boarded the train solely for that purpose. It is reasonable to suppose that plaintiff would not have approached him, and made known the infirmity of the old woman if he intended to take passage himself. Had he intended to do so, it is more than probable he would have assisted the woman to board the train and to a seat without making known her condition and need of assistance to that servant of the defendant: *Louisville & N. R. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31; *Galloway v. Chicago, R. I. & P. Ry. Co.*, 87 Iowa, 458, 54 N. W. 447.

Nor can it be affirmed as a matter of law, that plaintiff's alighting from the train, while moving, under the circumstances shown, was an act of negligence which would defeat his recovery. Whether it was or not was a question for the jury: *Central R. R. & Banking Co. v. Miles*, 88 Ala. 256, 6 South. 696; *North Birmingham St. Ry. v. Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105, 7 South. 360; *Montgomery & Eufaula R. R. Co. v. Stewart*, 91 Ala. 421, 8 South. 708; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 24 South.

392, 43 L. R. A. 297, and authorities there cited. There was clearly no duty on plaintiff to request the conductor to stop the train, after it started, for him to alight: *Central R. R. & Banking Co. v. Miles*, 88 Ala. 256, 6 South. 696. He had the right to get off, and if injured in doing so he may recover if the conductor knew or ought to have known what his purpose was in boarding ⁸¹ it, there being no dispute but that he was diligent in the service he was rendering, and in getting off he did no more than a prudent and careful man would have done. And the breach of duty owing to him by the conductor in starting the train without giving him a reasonable opportunity to alight was clearly the proximate cause of his injury, just as much so as was the breach of duty the proximate cause of the injury recovered for in the case of *Central R. R. & Banking Co. v. Miles*, 88 Ala. 256, 6 South. 696, and other cases cited by us of a similar nature. We need only apply these principles to the points insisted on for a reversal in brief of appellant's counsel, except as to charge 8, to see that none of them are well taken.

Charge 8 was calculated to mislead the jury to the conclusion that the conductor must have had express notice that plaintiff was not a passenger, or did not intend to remain on the train.

Affirmed.

Weakley, C. J., and Simpson and Anderson, JJ., concur.

The Duty of Carriers to Persons Assisting Passengers on a train is discussed in the notes to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 97; *Little Rock etc. Ry. Co. v. Lawton*, 29 Am. St. Rep. 54. If the father of an invalid daughter has an agreement with a railroad company that its cars shall stop long enough for him to put her aboard the cars, and to alight therefrom in safety, the relation of carrier and passenger exists between him and the company while he is assisting her on the cars and departing therefrom: *Evansville etc. R. R. Co. v. Athon*, 6 Ind. App. 295, 51 Am. St. Rep. 303. But it is said that a person who goes into the caboose of a freight train to assist a passenger, without license or expectation of becoming a passenger, is a mere trespasser, to whom the railroad company owes no duty until it has knowledge that he is there: *Earl v. Chicago etc. Ry. Co.*, 109 Iowa, 14, 77 Am. St. Rep. 516. And if a man goes to a depot with his wife to assist her in taking a train, but with no intention himself of becoming a passenger, it is said that the railway company owes him no duty of protection from third persons at the depot: *Houston etc. R. R. Co. v. Phillio*, 96 Tex. 18, 97 Am. St. Rep. 868.

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DANIELS v. CARNEY.

[148 Ala. 81, 42 South. 452.]

PLEADING—What not Sufficient to Charge Defendant with Knowledge.—An averment that the defendant's servants were guilty of negligence in failing to stop the paddle-wheels to prevent the creation of a succession of large waves when a small boat with occupants was plainly visible to such servants is defective, in not further stating that such boat and its contents were actually seen by them. (p. 36.)

PLEADING—Necessity of Averring Knowledge of Danger.—A complaint charging negligence in not stopping the revolutions of a propeller or paddle-wheel of a steamboat when a small boat and its occupants were seen by the defendant's servants is defective, in not showing that the peril of such occupants was an obvious one, or was known to the servants. (p. 36.)

NAVIGABLE WATERS—Respective Rights of Large and Small Boats.—The exercise of the right of navigation is as much guaranteed to small craft as to a great steamer. Each owes the other the duty of observance of due care so as to avoid inflicting wrong and injury upon the other. The injury resulting from a violation of this duty, whether intentional or through negligence, carries with it the legal responsibility of answering in damages. (p. 37.)

NAVIGABLE WATERS—Duty of Steamers to Stop the Revolution of Paddle-wheels to Prevent Injury to Occupants of Small Boats.—If a steamer and a small boat are being navigated in a river, and the small boat is in such a position that the continued revolution of the steamer's paddle-wheel or propeller will create large waves sufficient to capsize or swamp the small boat in passing, thereby endangering the lives of its occupants, the steamer and its owners owe the duty to such occupants of avoiding the danger by ceasing the normal operation of the steamer and stopping the revolution of its wheels or propeller until the small boat has passed without the zone of danger of waves from the larger boat, and if, by failing to do so, any of such occupants loses his life, such owners are answerable. (p. 37.)

NAVIGABLE WATERS—Contributory Negligence—Occupants of Small Boats, When not Presumed Guilty of.—Where persons in a small boat in a navigable stream are safe in the absence of an unusual disturbance in the water, and the water at the time the steamer approaches is smooth, they cannot be adjudged guilty of contributory negligence when the boat is capsized by waves due to the continuous revolution of the propeller or wheels of the steamer. Such persons had the right to assume that the navigators of large crafts would observe their duty under the law toward a small boat to avoid the infliction of injury. (p. 37.)

MASTER AND SERVANT—Steamboat, Failure to Allege that Persons Operating Were Acting in the Line of Their Authority.—In an action against the owners of a steamboat to recover for the death of a human being averred to have occurred from the negligence of servants who were operating such boat in failing to discontinue such operation and to stop the propeller or wheels of such steamer, and thereby prevent large waves by which the small boat was capsized, the complaint must allege that such servants acted at the time in the scope and line of their authority. (p. 38.)

Action by an administratrix to recover for personal injuries resulting in the death of her intestate. Demurrers interposed to the complaint were sustained and judgment entered thereon in favor of the defendant, from which the plaintiff appealed.

R. W. Stoutz, for the appellant.

Gregory L. and H. T. Smith, for the appellees.

⁸³ DOWDELL, J. The complaint was originally filed containing two counts, and was afterward amended by the addition of the third count, which latter count was subsequently amended. The complaint was demurred to, both as originally filed and as amended, which demurrers being sustained by the court, the plaintiff declined to further plead, and thereupon judgment was rendered for the defendant, from which judgment the present appeal is prosecuted. The court's ruling on the demurrers constitutes the basis of the first four assignments of error; the fifth and last assignment being based on the final judgment rendered.

The suit is to recover damages for personal injury, resulting in the death of plaintiff's intestate by drowning, through the negligence of defendant's servants in the operation of defendant's steamboat, causing the small boat in which plaintiff's intestate was riding to be capsized in Mobile river. The theory of the plaintiff's case is that the death of plaintiff's intestate was the proximate result of the failure of defendant's servants to exercise due care in the operation of defendant's steamboat after the discovery of the peril of said intestate. There is no pretense of any prior negligence in the operation of said steamboat whereby the accident resulted. On the contrary, it is averred that the steamboat ⁸⁴ was being operated in the usual and normal way. The theory, as well as the insistence in argument, of plaintiff's counsel, is that it was the duty of the servants, after the discovery of the peril, to cease the normal operation of the steamboat, by stopping the revolution of the propeller or paddle-wheels of said boat, in order to prevent the creation of waves, which, it is alleged, caused the swamping or capsizing of the small boat in which said intestate was riding.

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⁸³ DOWDELL, J. The complaint was originally filed containing two counts, and was afterward amended by the addition of the third count, which latter count was subsequently amended. The complaint was demurred to, both as originally filed and as amended, which demurrers being sustained by the court, the plaintiff declined to further plead, and thereupon judgment was rendered for the defendant, from which judgment the present appeal is prosecuted. The court's ruling on the demurrers constitutes the basis of the first four assignments of error; the fifth and last assignment being based on the final judgment rendered.

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boat at the time of the alleged wrong and injury were acting within the scope and line of their authority. Non constat these servants were at the time and place acting in utter disregard of authority of the master, in which event no responsibility could attach to the master on account of their negligent operation of the steamboat. In the case of *Lampkin v. Louisville & N. R. R. Co.*, 106 Ala. 287, 17 South. 448, the plaintiff was a passenger on defendant's train, and while a passenger was assaulted by a brakeman on said train. It was held in that case that the facts stated in the complaint were sufficient, without stating in terms that the employé by whom plaintiff was assaulted was acting within the scope of his duties. In *Woodward Iron Co. v. Herndon*, 114 Ala. 191, 21 South. 430, that suit was brought under the employers' liability statute, and the court ruled that where the complaint averred that the engineer was in charge and control of an engine, which he was at the time running over a track of the company's, this was *prima facie* sufficient to show that he was in the discharge of his duties under such employment. The facts in the case before us, we think, differentiate the case from the foregoing cases cited and relied on by the appellant. In the *Lampkin* case (106 Ala. 287, 17 South. 448), the relationship of carrier and passenger is shown, with the duties and responsibilities attaching to such relation under the law, and the further fact is shown that the assaulting party was an employé and brakeman⁸⁷ on defendant's train. In the *Woodward Iron Co.* case (114 Ala. 191, 21 South. 430), the suit being under the employers' liability statute, the court ruled that the averments in the complaint as to superintendence, etc., were within the terms of the statute. In the case before us no relationship existed between the plaintiff's intestate and the defendant, and the suit is for a common-law liability, and not under the statute. In *Postal Tel. Co. v. Brantley*, 107 Ala. 683, 18 South. 321, it is said: "The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly inferred from the nature of the employment and the duties incident to it." In the plaintiff's complaint it is not charged that the defendant was guilty of negligence, but the negligence complained of was that of defendant's servant. We think it perfectly clear that the defendant

could not be made liable for any acts of her servants done by them without the scope of their employment, and not by her authority. If these servants undertook to operate her steamboat down the river without her authority, she could not be made liable for their wrongful acts. This being true, it follows, in order to fix a liability upon her for negligent conduct of the servants, it should be averred and shown that they were acting with her authority or within the scope and line of their employment.

Finding no errors in the ruling of the court on the demurrers, the judgment appealed from will be affirmed.

Affirmed.

Weakley, C. J., and Haralson and Denson, JJ., concur.

THE DUTIES REQUIRED OF TWO OR MORE VESSELS ON NAVIGABLE WATERS TO AVOID INJURING EACH OTHER AND THEIR OCCUPANTS.

- I. Scope of Note, 39.**
- II. Degree of Care Required.**
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 - b. Fault of One Vessel will not Relieve the Other from Want of Due Care, 41.**
- III. Care Required of Steamers as to Speed, 42.**
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- V. Duty of Vessels Moving in Fog, 46.**
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- XVI. Duty of Vessels to Answer Signals, 52.**
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- XVIII. Duty of Larger Vessels to Avoid Imperiling Smaller Craft by Swells.**
 - a. In General, 53.**
 - b. Rowboats, 58.**

I. Scope of Note.

It is the purpose of this note to discuss the duties which are required of those intrusted with the management of two or more ves-

sels on navigable waters to avoid injury to the vessels and their occupants not only by collisions, but also to embrace the duties which larger vessels owe to smaller craft (including rowboats) to avoid imperiling the smaller craft by their swells. As this latter branch of the subject has not been heretofore much noticed by law-writers, it will be given considerable attention in this note. In connection with this note, see the note on collisions attached to *Broadwell v. Swigert*, 45 Am. Dec. 51, and the note attached to *Baker v. Lewis*, 75 Am. Dec. 601. For the duty of ship owners to seaman, see the note attached to *Scarff v. Metcalf*, 1 Am. St. Rep. 812, and the note attached to *Gabrielson v. Waydell*, 31 Am. St. Rep. 805.

II. Degree of Care Required.

a. **In General.**—The ever-increasing amount of travel by water, as well as the fact that a large part of the world's products is transported by means of navigation, makes the question of the duty required of those intrusted with the navigation of vessels, for the protection of life and property, one of prime importance. Certain rules and regulations regarding the management of vessels intended to guard against accidents and to protect persons and property on navigable waters have been adopted by nearly all the great nations of the world. But a technical observance of these rules will not absolve those in charge of such vessels from avoiding accidents, for the maritime law recognizes that an observance of these rules is not always sufficient, and has wisely adopted as its paramount rule that accidents must be avoided, and is therefore rigid in exacting unremitting care and vigilance on the part of those intrusted with the navigation of vessels, and any negligence, inattention, or want of skill resulting in injury to person or property will entitle the sufferer to compensation: *Baker v. Lewis*, 33 Pa. 301, 75 Am. Dec. 598, and note; *The Petrel*, Fed. Cas. No. 2261, 6 McLean, 491; *The Clytie*, Fed. Cas. No. 2913, 10 Ben. 588; *The D. S. Gregory*, Fed. Cas. No. 4103, 16 Blatchf. 542; *The Lincoln*, Fed. Cas. No. 8354, 1 Low. 46; *Mills v. The Nathaniel Holmes*, Fed. Cas. No. 9613, 1 Bond, 352; *Ward v. Ogdensburgh*, Fed. Cas. No. 17,158, Newb. 139; *Western Ins. Co. v. The Goody Friends*, Fed. Cas. No. 17,436; *The Alicia A. Washburn*, 19 Fed. 788; *The Nacoochee*, 22 Fed. 855.

Perhaps the best illustrations of this rule are found in those cases where the plea of inevitable accident was interposed by the vessel alleged to be at fault. In *The Nacoochee*, 22 Fed. 855, it was held that a collision between two vessels in a fog could not be justified on the plea of inevitable accident unless it appeared that both vessels had endeavored by all means in their power, with due care and a proper display of nautical skill, to prevent the accident.

In *The Clarita*, 23 Wall. 1, 23 L. ed. 146, Mr. Justice Clifford said: "Such a defense [inevitable accident] can never be sustained where it appears that the disaster was caused by negligence. . . . Unless

it appears that both parties have endeavored by all means in their power, with due care and a proper display of nautical skill, to prevent the collision, the defense of inevitable accident is inapplicable to the case." And in *The Morning Light*, 2 Wall. 550, 17 L. ed. 862, and *The Pennsylvania*, 19 Wall. 125, 22 L. ed. 148, the doctrine is plainly stated that an inevitable accident is only one which could not be prevented by the exercise of ordinary care, caution and maritime skill.

b. Fault of One Vessel will not Relieve the Other from Want of Due Care.—When a vessel sees danger of a collision, she is bound to use every means in her power to prevent it and to abate the consequences, although the other vessel was at fault: *Carlisle v. Holton*, 3 La. Ann. 48, 48 Am. Dec. 440; *The Vim*, 12 Fed. 906; *The B. & C.*, 18 Fed. 543; *The Garden City*, 19 Fed. 529. And this rule prevails no matter what the prior fault of the other vessel may be: *The Scioto*, Fed. Cas. No. 12,508; *The Maria Martin*, 12 Wall. 31, 20 L. ed. 251; *The Warren*, 18 Fed. 559; *The Pegasus*, 19 Fed. 46. Hence in *Cummins v. Spruance*, 4 Harr. (Del.) 315, it was held that a vessel, though out of her proper place, was not to be run into with impunity if she could be avoided by the exercise of ordinary care and skill. And this rule was adopted in *Moore v. Moss*, 14 Ill. 106, where a vessel was not only out of her proper course, but in the course of the other vessel. In *The Farmer v. McCraw*, 26 Ala. 189, 62 Am. Dec. 718, it is said: "Because a flat boat runs at night when she should not, or ties up in the wrong place, would not justify a steamboat in running into her, any more than a stagecoach would be justified in willfully or carelessly running over a man lying asleep in the road; and in all such cases if the act causing the injury could have been prevented by the use of ordinary care, the failure to use it will render the party liable. There is no inflexible rule either of the river or the road, the neglect of which by one party will dispense with the exercise of common caution by the other."

It was undoubtedly the rule at common law that where a collision was due to the fault of both vessels, neither could recover for the resulting injury, for, as was said by Lord Tenterden, in *Vanderplank v. Miller*, *Moore & M.* 169, "The question is whether you think the accident was occasioned by the want of care on the part of the crew of the *Robert and Ann*. If there was want of care on both sides, the plaintiffs cannot maintain their action; to enable them to do so, the accident must be attributed entirely to the fault of the crew of the defendant."

But in its desire to establish as paramount law the rule that accidents must be avoided, and to impose greater caution on the part of those in charge of a vessel to avoid a collision even when the other vessel is grossly at fault, the admiralty law of both England and this country is, that if there is fault on the part of both vessels, neither is excused, but the loss must be equally borne. Thus in

The *Woodrop*, 2 *Dod's Adm.* 83, Lord Stowell, who is justly distinguished as an admiralty judge, said: "A misfortune of this kind [collision] may arise when both parties are to blame, when there has been want of due diligence or skill on both sides. In such case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them." The rule thus laid down by Lord Stowell has been universally followed in the United States: *Reeves v. The Constitution*, Fed. Cas. No. 11,659; *Stainback v. Rae*, 14 How. (U. S.) 532, 14 L. ed. 530; *The Catherine v. Dickinson*, 17 How. (U. S.) 170, 15 L. ed. 233; *Sturgis v. Boyer*, 24 How. (U. S.) 110, 16 L. ed. 591; *The Morning Light*, 2 Wall. 550, 17 L. ed. 862; *The Continental*, 14 Wall. 345, 20 L. ed. 802. A good case showing when both boats were guilty of negligence is that of *Ladd v. Foster*, 12 Saw. 547, 31 Fed. 827. Here the ferry-boat "New York," after getting one hundred feet from her landing on a trip from Albina to Portland, was hailed by a person on the landing who desired passage. The master undertook to back in for him, and in so doing drifted broadside against the wire cable of the ferry-boat "Albina," which at the time was navigating between Albina and North Portland, and was about three hundred feet from the shore. The river was swollen, and owing to the pressure of the current and the wind on the "Albina," her cable was caught up at or near the surface of the water between the boat and the shore, so that it caught the "New York" just under her guards and held her as on a pivot, and the current caused her to turn on her side. One of the passengers of the "New York" jumped out of the cabin and was caught between the cable and the boat, sustaining injuries from which he died the same day. It was held that his death was caused by the negligent handling of the "New York," although the "Albina" was also held liable, because the stretching of her cable on the surface was an unlawful obstruction of navigation.

III. Care Required of Steamers as to Speed.

One of the duties rigidly enforced by the courts with reference to the care required in the navigation of steam vessels, for the protection of life and property, is that when approaching each other, or other vessels where there is danger of a collision, it is their duty to go at such speed that will enable them to stop and reverse their engines in time to avoid an accident. Said Leavitt, J., in *Ward v. Ogdensburgh*, Fed. Cas. No. 17,158, Newb. 139: "The general tendency is to enforce the duty of great caution and unremitting vigilance on the part of those engaged in the navigation of vessels propelled by steam. The obligation of lessening the speed of steamboats, under all circumstances, where unchecked velocity may be supposed to be dangerous, is especially enjoined. And there can be no question that the preservation of human life, as well as of property, demands at this day, when there is such a disposition to sacrifice everything

to rapidity of movement, that owners and managers of steamboats should be held to a most rigid accountability." And the supreme court of the United States, in *Newton v. Stebbins*, 10 How. (U. S.) 586, 13 L. ed. 551, quoted with approval the language of the court in *The Rose*, 2 W. Rob. 1: "It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity if the property and lives of other persons are thereby endangered." Similar views are expressed in *The Empire State*, Fed. Cas. No. 4474, 2 Biss. 216; *The Free State*, 91 U. S. 200, 23 L. ed. 299. And when approaching a smaller vessel with tows a steamer is bound to slacken her speed and proceed with great caution. In *The Blenheim*, 14 Fed. 797, a steamer proceeding at a speed of nine miles an hour was bound to slacken her speed when approaching a sailing vessel in a narrow channel. And in *Hall v. The Buffalo*, Fed. Cas. No. 5927, it is held that a steamer on the St. Clair river on a dark night going eight miles an hour was bound to slacken her speed upon seeing a vessel's lights a short distance below her. So, too, when a steamer has discovered the light of an approaching sailing vessel and lost it, she must reduce her speed, or even stop, if necessary, until she finds it again: *The Illinois*, Fed. Cas. No. 7002, 5 Blatchf. 256. And when a steamboat is passing a ferry slip she is bound to go at such speed that she could stop in time to prevent striking a ferry-boat in case one should come out: *The D. R. Martin*, Fed. Cas. No. 4091, 10 Ben. 532. In *The Little Giant*, Fed. Cas. No. 8401, 2 Biss. 23, it is announced that a tug has no right to run in a crowded thoroughfare like the Chicago river at a speed greater than five miles an hour.

IV. Duty to Keep Lookout.

a. **On Forward Part of Vessel.**—Another rule which is vigorously enforced by the courts, because it is considered one of the most important safeguards against accidents, is that vessels must keep a lookout on the forward part of the ship: *Ward v. Armstrong*, 14 Ill. 283; *The America*, Fed. Cas. No. 284, 10 Blatchf. 155; *The Ancon*, Fed. Cas. No. 348, 6 Saw. 118; *The City of New York*, Fed. Cas. No. 2759, 8 Blatchf. 194; *Killam v. The Erie*, Fed. Cas. No. 7765; *The Parkinsburg*, Fed. Cas. No. 10,753, 5 Blatchf. 247; *Ward v. Ogdensburgh*, Fed. Cas. No. 17,158, Newb. 139; *The Sam Rotan*, 20 Fed. 333; *St. John v. Paine*, 10 How. (U. S.) 557, 13 L. ed. 537; *Newton v. Stebbins*, 10 How. (U. S.) 586, 13 L. ed. 551; *The Ottawa v. Stewart*, 3 Wall. 268, 18 L. ed. 165. And not only must the lookout be placed in the forward part of the vessel, but his position must be such that his view will not be obstructed by smokestacks or sails: *The Java*, Fed. Cas. No. 7233, 14 Blatchf. 524; *The Majenta*, Fed. Cas. No. 8946, 2 Abb. (U. S.) 495. And the lookout must be one who can give his entire attention to that duty; the man at the wheel is not a proper lookout: *Philadelphia etc. R. R. Co. v. Kerr*, 33 Md. 331;

The Blossom, Fed. Cas. No. 1564 (Olc. 188); The Parkinsburg, Fed. Cas. No. 10,753, 5 Blatchf. 247; Newton v. Stebbins, 10 How. (U. S.) 586, 13 L. ed. 581; The Genessee Chief v. Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058. Hence neither the captain or the mate is a proper lookout: Bill v. Smith, 39 Conn. 206; The Tillie, Fed. Cas. No. 14,049, 13 Blatchf. 514; The Sam Rotan, 20 Fed. 333. And the fact that all hands had been called aft to attend to some other duty required would not excuse the failure to keep a proper lookout: The Schooner Catherine v. Dickinson, 17 How. (U. S.) 170, 15 L. ed. 233; Whitridge v. Dill, 23 How. (U. S.) 448, 16 L. ed. 581; The New Orleans, 106 U. S. 13, 1 Sup. Ct. Rep. 90, 27 L. ed. 96. The case of Ward v. Ogdensburgh, Fed. Cas. No. 17,158, Newb. 139, illustrates how exacting the law is in requiring a lookout on the forward part of a vessel. The case was one of great importance, because it involved the loss of a large passenger ship and some two hundred lives. It was evidently carefully considered, and all the leading cases, both English and American, touching the questions involved were fully reviewed. The loss of life and property was due to a collision between the "Atlantic," a large passenger steamer on its way from Buffalo to Detroit, and the "Ogdensburgh," a large propeller navigating on the lake. The action for damages was against both vessels, but the owners of the propeller "Ogdensburgh" insisted that the accident resulted from the failure of the "Atlantic" to have a proper lookout on the forward part of the vessel. On the night of the collision, it was not dark—in fact, the stars were shining—but the haze on the lake made it difficult to see objects at any great distance, and the route of the "Atlantic" was one much frequented by other vessels. The "Atlantic" was a large steamer of great speed, and on the night of the disaster had between five hundred and six hundred persons on board. The facts regarding the question at issue as to a lookout on the steamer will appear from the language of the court, which we quote at length: "It is insisted that the 'Atlantic' had no sufficient watch on deck during the night of the collision. The night, as already noticed, was not dark, but the haze on the lake made it difficult to distinguish objects at any considerable distance. The route of the steamer, especially in the vicinity of Long Point light, was one much frequented by vessels and steamers passing up and down the lake, and to and from points along the southern shore, by propellers and other craft, carrying on commerce with the lower lakes through the Welland canal. The 'Atlantic' was a steamer of great power and of great speed; and, on the night referred to, was the freighter of between five and six hundred human beings. These facts are quite sufficient to justify the conclusion that those intrusted with her management and navigation were called upon for the exercise of the greatest watchfulness and care. It seems the only persons on deck having any rightful connection with the steamer, from the time she left Buffalo till the occurrence of the terrible col-

lision, which sent her to the bottom of the lake, and occasioned the loss of some two hundred human lives, were the second mate and the wheelsman. As before noticed, it was the captain's watch; and the testimony of the most experienced and reliable experts is, that under the circumstances of the case, it was wholly improper that the captain should have intrusted the care of the boat to the sole management of the second mate, an officer in whom the higher qualifications of a navigator are not looked for, and who, in the language of a very intelligent expert, is viewed as the mere 'drudge' or assistant of the captain. In point of fact, the second mate, even if his competency for the station is admitted (which is, at least, doubtful), did not keep a vigilant lookout, within the requirements of the decisions of the highest judicial tribunals of the country. He was, by his own statement, in the pilot-house at the time he made the lights of the propeller, looking from one of the windows; and did not make these lights till they were about one mile distant. In the case of *St. John v. Paine*, 10 How. (51 U. S.) 557, 13 L. ed. 557, it was said by Judge Nelson, in delivering the opinion of the court, that 'the steamboat was in fault in not keeping at the time a proper lookout on the forward part of the deck; and that the failure to descry the schooner at a greater distance than half a mile ahead is attributable to this neglect. The pilot-house in the night, especially if dark and the view obscured by clouds in the distance, was not the proper place, whether the windows were up or down. The view of a lookout stationed there must necessarily be interrupted.' And in the same case the court held, 'that a competent and vigilant lookout, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, at the earliest moment, is indispensable to exempt the steamboat from blame in case of accident in the night-time, while navigating waters on which it is accustomed to meet other water craft.' And again the court said: 'There is nothing harsh or unreasonable in this rule; and its strict observance and enforcement will be found as beneficial to the interests of the owner as to the safety of navigation.' In the case of the *Genessee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058, in giving the opinion of the court, Chief Justice Taney says: 'It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout, besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other lookout than the helmsman, or that such lookout was not stationed in a proper place, or not actively and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault.'

“In a recent case of admiralty, against the steamboat ‘Northern Indiana,’ a passenger boat on Lake Erie, decided by Judge Hall, of the district court of the United States for the northern district of New York (Fed. Cas. No. 10,320, 3 Blatchf. 92), it was held that the mate alone, while the officer of the deck, though in all respects competent to the duty, did not constitute a sufficient lookout within the requirements of the decisions of the supreme court of the United States referred to. The judge remarks that, ‘the mate was the officer of the deck, holding the temporary command of the vessel, and liable to be continually called to the discharge of duties inconsistent with the keeping of a constant and vigilant watch, and ought not to have been relied on for that purpose.’ In England, the rules prescribed by the courts in regard to lookouts are more stringent than in the United States. A case is reported in 2 Eng. Law & Eq. 557, in which the ‘Europa,’ one of the Atlantic steamers, was condemned for an injury to a sailing vessel, occurring during a thick fog, on the route of steam travel between the United States and England, on the ground of the insufficiency of her lookout; when the proof was, that there was an officer stationed on the bridge, a quartermaster on the top-gallant forecastle, another quartermaster at the con, besides one at the wheel. I cannot hesitate to say, in view of these authorities, that the ‘Atlantic’ did not maintain a sufficient lookout on the night of the collision.”

b. *Astern*.—Though the law, as we have seen, is very exacting in requiring all vessels to keep a competent lookout on the forward part of the deck, it does not require them to keep a lookout astern to give notice of being overtaken by a vessel approaching from behind: *Erwin v. Neversink Steamboat Co.*, 23 Hun, 578, affirmed in 88 N. Y. 184. This rule is founded upon the reason, as we shall hereafter see, that the greatest caution is imposed on overtaking vessels to prevent accident. And a proper observance on their part would render a lookout astern on the other vessel unnecessary.

There is, however, an exception to the rule, for when a steamer is backing out of her slip, she is required to maintain a proper lookout astern to avoid injury to neighboring craft: *The Nevada*, Fed. Cas. No. 10,131, 17 Blatchf. 122.

V. Duty of Vessels Moving in Fog.

When vessels are moving in a fog they are bound to proceed with great care and circumspection, and at such moderate speed that they can be easily stopped: *The Bristol*, Fed. Cas. No. 1892, 10 Blatchf. 537; *The Chancellor*, Fed. Cas. No. 2589, 4 Ben. 153; *Leonard v. Whitwill*, Fed. Cas. No. 8261, 10 Ben. 638; *Morrison v. Petaluma*, Fed. Cas. No. 9848, 1 Saw. 126; *The Shady Side*, Fed. Cas. No. 12,692, 17 Blatchf. 132. And they should proceed only at such speed as would allow them to be stopped immediately upon the appearance of danger: *The Eleanora*, Fed. Cas. No. 4335, 17 Blatchf. 88; *The Leland*, 19 Fed.

771. This rule has been held applicable also to sailing vessels: *Guibert v. The George Bell*, Fed. Cas. No. 5856, 3 Hughes, 468; *The John Hopkins*, 13 Fed. 185.

In *The Leland*, 19 Fed. 771, it was held that a steamer going eight and a half miles an hour in a dense fog on Lake Michigan was going too fast. And in *The Lepanto*, 21 Fed. 651, a steamer going seven and a half knots an hour in a dense fog was held not to be going at moderate speed. In *The Colorado v. The H. P. Bridge*, 91 U. S. 692, 23 L. ed. 379, the supreme court of the United States announced that five or six knots an hour was too fast for a steamer to proceed on Lake Huron in a dense fog.

In *The Manistee*, 7 Biss. 35, Fed. Cas. No. 9028, seven and a half miles an hour was held entirely too fast. In *The Hansa*, 5 Ben. 501, Fed. Cas. No. 6037, nine and a half knots an hour in a fog was held not to be moderate speed. And a vessel going at a greater speed than eight knots an hour in the South Vineyard channel in a fog was held immoderate: *The Blackstone*, 1 Low. 485, Fed. Cas. No. 1473. In *McCready v. Goldsmith*, 18 How. (U. S.) 89, 15 L. ed. 288, it was held that a steamer going sixteen or seventeen miles an hour in a fog on Long Island Sound in the direct track of the coasting trade was grossly at fault.

In *The City of Panama*, 5 Saw. 63, Fed. Cas. No. 2764, it was held that a steamer going eight miles an hour in a fog at sea was going at an immoderate rate of speed. While in *The Andrew Hicks*, 24 Fed. 653, it is said that ten to ten and a half knots an hour in a fog in mid-ocean is immoderate speed. In the recent case of *The Kentucky*, 148 Fed. 500, it is held that a steamer navigating in a fog at such rate of speed that when another vessel, which was practically motionless, came into view she was unable to stop in time to avoid a collision was in fault for excessive speed.

So, too, when two steamers are approaching from opposite directions in a fog they must not only check speed, but, if necessary, stop and back: *Ward v. Ogdensburgh*, Newb. 139, Fed. Cas. No. 17,158.

In *Palmer v. Merchants' and Miners' Transp. Co.*, 154 Fed. 683, it was held that a steamer going at a speed of ten or eleven knots an hour in a fog at sea was not going at moderate speed, and that when the master heard a single blast of the fog horn of another vessel nearly ahead and apparently only a short distance away, he was not justified in assuming that he could locate the precise position of such vessel, and that he was overtaking her, but it was his duty to at once reverse and go full speed astern until the steamer was stopped and the location of the other vessel definitely ascertained. In this case it is also held that a schooner in a dense fog going three and a half knots an hour was going at moderate speed.

VI. When a Vessel Ought to be Stopped.

It is one of the cardinal rules of navigation that when a steamer cannot be steered, she should be stopped: *The Minnie R. Childs*, Fed.

Cas. No. 9639. But there are other times when she is required to stop in order to prevent accident and protect life and the destruction of property. Thus, when she sees a sailing vessel approaching her with fluctuating lights, she should stop until the sailing vessel's course is definitely known: *The Westover*, 2 Fed. 91. It seems, however, that a sailing vessel is not bound to shorten sail or lie to because an approaching vessel cannot be seen on account of the darkness of the night: *The Morning Light*, 2 Wall. 550.

VII. Duty of Sailing Vessels to Keep Their Course.

As vessels propelled by steam are more easily handled than sailing vessels, it is an imperative rule of navigation that the latter should hold their course: *The Pilot*, 20 Fed. 80; *The Plymouth*, 26 Fed. 879; *The Carroll*, 8 Wall. 302; *The Scotia*, 14 Wall. 170; *Ludwig v. The Free State*, 91 U. S. 200, 23 L. ed. 299; *Golding v. The Illinois*, 103 U. S. 298, 26 L. ed. 562; *Marshall v. The Adriatic*, 107 U. S. 512, 27 L. ed. 497.

But while this rule is imperative, and it may be stated, as a general proposition, that when an accident occurs between a steamer and a sailing vessel it would have to be a strong case which could put the sailing vessel in the wrong for holding her course, still the rule does not prevent her from changing her course to avoid immediate danger—such, for example, as danger arising from natural obstructions to navigation: *Lyman v. The John L. Hasbrouck*, 93 U. S. 405, 23 L. ed. 962; nor to avoid immediate collision with a steamer: *Waldorf v. The New York*, 1 Flipp. 49, Fed. Cas. No. 17,057. The reason for the imperative rule that sailing vessels must keep their course is based on the rule that a steam vessel is required to keep out of the way; and is well illustrated in *New York etc. Steamship Co. v. Rumball*, 21 How. (U. S.) 372, 16 L. ed. 144, where the court said: "Under the rule that a steamer must keep out of the way, she must, of necessity, determine for herself and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or left, or stop; and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required, in the admiralty jurisprudence of the United States, that sailing vessels shall keep their course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty and fulfill the requirement of the law to keep out of the way."

VIII. Duty of Steamers to Keep Out of Way of Sailing Vessels.

The duty of sailing vessels to hold their course is founded upon the rule strictly enjoined upon steamboats, namely, that it is the duty of a steamer to keep out of the way of a sailing vessel when

they are approaching each other in such a way as to involve risk of a collision. This general doctrine, being based on the sound principle that vessels propelled by steam are so much more easily controlled than sailing vessels, is universally upheld: *Philadelphia W. & B. R. Co. v. Kerr*, 33 Md. 331; *Mailler v. Express Propeller Line*, 61 N. Y. 312; *Lockwood v. Lashell*, 19 Pa. 344; *Holmes v. Watson*, 29 Pa. 457; *The Cadiz*, 20 Fed. 157; *Haight v. Bird*, 26 Fed. 539; *The Oregon v. Rocca*, 18 How. (U. S.) 570, 15 L. ed. 515; *New York S. B. Co. v. Rumball*, 21 How. (U. S.) 372, 16 L. ed. 144; *The Carroll v. Green*, 8 Wall. 302, 19 L. ed. 392; *The Fannie v. The Ellen Forrester*, 11 Wall. 238, 20 L. ed. 114; *The Benefactor v. Mount*, 102 U. S. 214, 26 L. ed. 157; *Golding v. The Illinois*, 103 U. S. 298, 26 L. ed. 562. And this duty on the part of steamboats extends to barges propelled by oars: *Bigley v. Williams*, 80 Pa. 107. And also to flat boats floating with the current of a river: *Pearce v. Page*, 24 How. (U. S.) 228, 16 L. ed. 623. But it seems the rule does not apply to rowboats: *Philadelphia R. R. Co. v. Adams*, 89 Pa. 31, 33 Am. Rep. 721, though of this we will speak later under a separate subdivision in this note.

IX. Duty of Overtaking Vessel to Keep Out of Way.

It is a well-established law of navigation that a vessel overtaking another must keep out of the way of the latter: *Erwin v. Neversink Steamboat Co.*, 23 Hun, 573, affirmed in 88 N. Y. 184; *The Naragansett*, Fed. Cas. No. 10,018, 10 Blatchf. 475; *The W. H. Clark*, Fed. Cas. No. 17,482, 5 Biss. 295; *The Peter Ritter*, 14 Fed. 173; *Whitridge v. Dill*, 23 How. (U. S.) 448, 16 L. ed. 581, where Mr. Justice Clifford said: "Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead, and pursuing the same general direction, if both vessels are close hauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precaution to avoid a collision. That rule rests upon the principle that the vessel ahead, on that state of facts, has the seaway before her, and is entitled to hold her position; and, consequently, the vessel coming up must keep out of the way." And in *The Rhode Island*, Ole. 505, Fed. Cas. No. 11,745, the same rule is applied in the case of steam vessels, it being here held that an approaching steamer takes upon herself the point of determining whether a safe passage remains for her beside a vessel preceding her, and must bear the consequences of misjudgment in that respect, and that no immunity is extended by the law to the one possessing the greater speed, but that, so far as encouraging the exercise of this power to the utmost, the law continuously warns and checks vessels propelled by steam against an improvident employment of speed so as to avoid danger to others moving with less velocity. But, said Judge Bett in this case: "The law will not justify a vessel ahead varying her course or taking measures not indispensable to her own safety, to check or embarrass another vessel attempting to pass her."

In *Erwin v. Neversink Steamboat Co.*, 88 N. Y. 184, the two steamers "Hope" and "Americus" were navigating on East river. The latter overtook and struck the former, and the engineer of the "Hope" was drowned as a result of the collision. The "Americus" had signaled that she would pass to the left of the forward vessel but had received no answer to her signal. It was held that the overtaking vessel should have slackened her speed or stopped, and had no right to assume that the silence of the forward vessel in not replying to her signal was acquiescence. It was further held that the forward vessel was not guilty of negligence in not having a lookout astern, because it was the duty of the overtaking vessel to have kept out of the way and avoided the accident.

X. Duty of Vessels to Exhibit Lights.

One of the duties required of all vessels is to exhibit lights, and these lights must be placed and exhibited as the rules of navigation prescribe. Thus in *The Empire State*, Fed. Cas. No. 4474, 2 Biss. 216, it was held that a green and a red light placed in the center of a schooner with only a board between them was not a compliance with the act of Congress as to proper lights. And unless a steam vessel exhibits her proper lights to a sailing vessel, the latter will not be liable for failing to exhibit her torch to the steamer: *The New Orleans*, Fed. Cas. No. 10,180, 9 Ben. 303; and the lights of a sailing vessel must be placed in a conspicuous place and not obscured by the sails: *The Johanne Auguste*, 21 Fed. 134; and she must avoid showing a confusion of lights to an approaching steamer: *Allen v. Mackey*, Fed. Cas. No. 228, 1 Sprague, 219. In *Kelly v. Cunningham*, 1 Cal. 365, a brig lying in the harbor of San Francisco in the usual track of bay and river steamers was run into and damaged by a river steamer on her usual course, going at diminished speed. There was no intentional wrong on the part of those navigating the steamer. The brig had no lights hung out, and it was held that there was no liability on the part of the steam vessel because ordinary prudence required the brig to show a light, and the fact that it was the common practice in the harbor to neglect doing so was no excuse.

XI. Duty of Moving Vessel to Avoid One at Anchor.

It is the duty of a vessel in motion to avoid one anchored at a proper landing place: *Bill v. Smith*, 39 Conn. 206; *Knowlton v. Sanford*, 32 Me. 148, 52 Am. Dec. 649; *Mills v. Nathaniel Holmes*, Fed. Cas. No. 9613, 1 Bond, 352; *The Clara*, Fed. Cas. No. 2788, 5 Ben. 375; *The Rockaway*, 19 Fed. 449; *Sampson v. Hand*, 6 Whart. 311, 36 Am. Dec. 231. And in *Mercer v. The Florida*, Fed. Cas. No. 9433, 3 Hughes, 488, it is held that if a steamer runs into a vessel at anchor which is showing the proper lights, the presumption of the steamer's negligence is conclusive.

XII. Duty of Vessel at Anchor.

While a moving vessel is bound to avoid one at anchor, there are certain duties required of those at anchor in the path of other vessels. One of these duties is, that the anchored vessel must keep an anchor watch: *The Lydia*, Fed. Cas. No. 8614, 4 Ben. 523; *O'Neal v. Sears*, Fed. Cas. No. 10,530, 2 Sprague, 52; *The Sapphire v. Napoleon* 111, 11 Wall. 164, 20 L. ed. 127; *Shepherd v. The Clara*, 102 U. S. 200, 26 L. ed. 145. And it is also her duty to display a light: *Kelly v. Cunningham*, 1 Cal. 365; *Innis v. The Senator*, 1 Cal. 459, 54 Am. Dec. 305; *Lenox v. Winismmet Co.*, Fed. Cas. No. 8248, 1 Sprague, 160; *Simpson v. Hand*, 6 Whart. 311, 36 Am. Dec. 231. It is also the duty of a vessel anchoring in a river near a city and at a place where vessels making a landing are liable to come, to give the necessary fog signals in a fog or snowstorm: *The Porter*, Fed. Cas. No. 11,285, 2 Dill. 146. So, too, when a vessel anchors in a river at night, it is bound to exercise great care to leave ample room in the channel for passing vessels, and is not only required to keep anchor watch and proper lights, but should so locate her anchorage as to avoid any possible danger: *The Oscar Townsend*, 17 Fed. 93. But, except when impelled by necessity, a vessel should not anchor in the regular path of river steamers, and if compelled to do so, must move as soon as the necessity for so anchoring has passed away: *Knowlton v. Sanford*, 32 Me. 148, 52 Am. Dec. 649. This rule applies also to vessels anchoring in a channel or the entrance to a harbor: *The Exchange*, Fed. Cas. No. 4593, 10 Blatchf. 168. In this case a vessel anchored during the afternoon in the track of a ferry navigating between New York and Brooklyn. She was requested to move but failed to do so. She displayed no lights and during the night, which was dark and foggy, she was run into by the ferry and damage resulted. It was claimed that having been seen by the ferry during the afternoon, that the ferry was bound to take notice of her location, and was guilty of negligence in running into her at night. It was held that, even if the ferry was bound to assume that the vessel still remained anchored, after having been requested to move, that there was no liability, and the ferry was not bound to suspend her trips or depart from her usual course.

XIII. Duty of Vessel Entering Harbor.

When a vessel is entering harbor the law imposes upon her great care and caution to avoid colliding with other vessels. She will not be excused for an accident caused by her, when she has only exercised ordinary care: *Ward v. Dousman*, Fed. Cas. No. 17,153, 6 McLean, 231; *The Badger State*, 15 Fed. 346; *Culbertson v. The Southern Belle*, 18 How. (U. S.) 584, 15 L. ed. 493. Thus, if she is entering at night and cannot see her way clear before her, it is her duty to stop: *Ward v. The A. Rossiter*, Fed. Cas. No. 17,147, 6 McLean,

63. Or, if the harbor is crowded with other vessels, she must move very slowly: *Ward v. The A. Rossiter*, Fed. Cas. No. 17,147, 6 McLean, 63. And she must approach in such manner as not to injure a canal boat lying at the end of a pier: *The Harry*, 15 Fed. 161.

So, too, ferry-boats crossing harbors of commercial ports at night or in a fog are bound to proceed with great caution: *Amoskeag Mfg. Co. v. The John Adams*, Fed. Cas. No. 388, 1 Cliff. 404. For ferry-boats have not the exclusive right of way over their fixed courses, but must keep out of the way of sailing vessels and must slacken speed if necessary to avoid collisions: *Edwards v. The Manhasset*, Fed. Cas. No. 4295.

XIV. Duty of Vessels When Passing Through Narrow Channels.

When vessels are passing through narrow channels, the law requires that they should take extra precautions to protect the lives of their occupants and avoid the destruction of property: *The Columbia*, Fed. Cas. No. 3035, 9 Ben. 254; *The Massachusetts*, Fed. Cas. No. 9288, 10 Ben. 177; *The Scott Greys v. The Santiago de Cuba*, 19 Fed. 213; *The Rescue*, 24 Fed. 44; *Newton v. Stebbins*, 10 How. (U. S.) 586, 13 L. ed. 551.

XV. Duty of Vessels When Approaching a Bridge.

The law also requires that a vessel should proceed with great caution when she is approaching the tiers of a bridge through which she must pass, and if the wind is squally, she must stop till the wind has gone down and she can safely pass: *The Mollie Mohler v. Home Ins. Co.*, 21 Wall. 230, 22 L. ed. 485. And when approaching a bridge she is also bound to keep a lookout: *Baltimore etc. R. Co. v. Wheeling etc. T. Co.*, 32 Ohio St. 116.

XVI. Duty of Vessels to Answer Signals.

When a vessel has been signaled by another vessel, she is bound to answer promptly: *The Garden City*, 19 Fed. 529; *The Mary Ida*, 20 Fed. 741. And when a vessel has signaled her intention to take a certain course, she must not proceed to carry out such purpose until she has received an answer from the other vessel assenting to that course. A failure to answer by the other cannot be considered an assent: *The Franconia*, 8 Fed. 397; *The Garden City*, 19 Fed. 529.

XVII. Duty of Vessel When Leaving Slip.

A steamer when leaving her slip is bound to use the utmost care in starting up her propeller, so as not to endanger the safety of other vessels by the disturbance of the water which necessarily follows. This rule is rigidly enforced, and if it is necessary for her to do so, she must keep a lookout astern and over her sides, and also

when necessary for the safety of neighboring craft, she must employ a tug to take her out: *The Colon*, Fed. Cas. No. 3022, 8 Ben. 512; *The Nevada*, Fed. Cas. No. 10,131, 17 Blatchf. 122. And in *Dunstan v. Kirkland R. R.*, Fed. Cas. No. 4181, 3 Hughes, 641, it is held that before a steamer starts from her wharf she must signal her intention so to do by blowing three long whistles.

XVIII. Duty of Larger Vessels to Avoid Imperiling Smaller Craft by Swells.

a. **In General.**—It is a principle of law fully established by the cases that large vessels are bound to use great care and precaution to avoid endangering smaller craft by the displacement of waves, which necessarily follows the movements of the former. The swell created by a large boat is greater, of course, in shallow water than in deep, and the degree of care which the law imposes on the larger vessel varies with the circumstances of each case. In some instances a slackening of speed might be sufficient to relieve her of negligence, while in others she would be required to change her course, or stop her propeller or paddle-wheels until the smaller vessel had safely gotten out of the way. The duty which larger vessels owe to smaller craft, when both are lawfully on navigable waters, is best understood by the following illustrations: *Daniels v. Carney*, 148 Ala. 81, ante, p. 34, 42 South. 452, 7 L. R. A., N. S., 920, was a suit for damages for personal injury resulting in the death of plaintiff's intestate by drowning through the negligence of defendant's servants in the operation of defendant's steamboat, causing the small boat in which plaintiff's intestate was riding to be capsized in the Mobile river. The steamboat was being operated in the usual and normal way, but it was claimed by plaintiff that the steamer should have stopped operation of its propeller and paddle-wheels after it discovered the small boat, and thereby prevent the creation of waves which resulted in capsizing the small boat. Said the court: "The right to navigate the same [a navigable water] is equally guaranteed to everyone. . . . The exercise and enjoyment of this right is as much guaranteed to the small craft as to the great steamer. Each one owes the other the duty of the observance of due care, so as to avoid inflicting wrong and injury upon the other. Injury resulting from the violation of this duty, whether intentional or through negligence, carries with it the legal responsibility of answering in damages. The defendant's servants, in the operation of the steamboat, whereby large waves were created by its propeller or paddle-wheels, sufficient to swamp or capsize a smaller boat in passing, thereby endangering the lives of the occupants of the small boat, owed to the latter the duty of avoiding the danger, by ceasing the normal operation of the steamer and stopping the revolution of its paddle-wheels or propeller, until the smaller boat had passed without the zone of danger of waves from the larger boat."

In *Wright v. Brown*, 4 Ind. 95, 58 Am. Dec. 622, a flat boat was capsized by the waves produced by a passing steamer, and the court held that the question of negligence on the part of the steamer should be considered from the same point of view as if she had collided with the flat boat.

In *Watson v. McGuire*, 17 B. Mon. (56 Ky.) 31, action was brought against the owners of a steamer to recover the value of two boats laden with coal which had been sunk while on the Kentucky river by the waves of a passing steamer. The lower court charged that "if the plaintiffs' boats were loaded heavier than was customary for coal boats navigating the Kentucky river, and this fact was known to the servants of the defendants managing the steamer as they approached the coal boats, it imposed upon them such additional precaution and care in passing the coal boats as ordinary prudent men would have taken to preserve their own property from loss." This charge was held erroneous, the higher court holding that, while the owner of a steamer in passing smaller craft is required to observe such care and precaution as ordinarily prudent and skillful men would observe under like circumstances, he is not held to the same degree of care and precaution that he would be as a bailee having control and possession of another's property, because the relation of trustee which exists in bailments is wanting.

In *The C. H. Northam*, Fed. Cas. No. 2689, a steamboat passed a tug in a narrow channel without much reduction of speed. One of the boats being towed by the tug was damaged as a result of the swells produced by the steamer. The water in the channel was not deep, and it was held that the steamer was bound to know both the depth of the water and the probable effect of her swells. And in *The Rotherfield*, 123 Fed. 460, and *The Asbury Park*, 138 Fed. 925, it is held that a steamer is bound to know the effect of her swells.

In *The Morrisania*, 13 Blatchf. 512, Fed. Cas. No. 9838, a bark was moored at the end of a wharf, and the "Morrisania," a passenger ferry plying between Harlem and New York, passed the dock where the bark was moored some fifteen to thirty feet from the bark at a speed of twelve or fourteen miles an hour. The channel at that point was about one thousand feet wide. The swell of the ferry caused the bark to strike against another vessel and thereby damage the bark; held, that the ferry was guilty of negligence in passing so near and at such speed. And a case with practically similar ruling is that of *The Southfield*, 19 Fed. 841.

In *The New York*, 34 Fed. 757, the steamer "New York" was going up the Hudson river against the tide. The steam tug "Norwich" was coming down with a tow. The two boats passed each other in a narrow channel where a canal boat lay along the shore. The suction and swell produced by the steamers caused the canal boat to strike the bottom of the river, thereby damaging it. Both steamers were moving slowly. The steamer "New York" had no-

tice of the presence of the canal boat and her pilot knew he would have to pass close to her. The "New York" was held liable for the damage, as it was her duty to have waited below the landing until the "Norwich" had passed, or else to have stopped her paddle-wheels while passing the canal boat.

In *De Lelle v. The Atalanta*, 34 Fed. 918, a steam yacht was passing down North river at a speed of less than fourteen knots an hour, creating waves about the same size as those of the largest steamers plying that river. Through the suction and swell caused by the yacht a canal boat discharging brick at a dock was seriously damaged. The yacht passed about one-half mile from the shore, and was in the habit of slackening her speed when she received any signal from the dock indicating that a vessel was there unloading. On the day of the accident she heard no signal and did not slow up. The canal boat was in plain view of the yacht. In holding the yacht guilty of negligence, Judge Brown, speaking for the court, said: "The heavy swells from steamers that make waves from one to three feet high are not, however, such ordinary incidents of navigation as boats are bound to take the risk of, whether large or small, new or old. On the contrary, it has been the settled law since the use of steamers in navigation, that, in plying about rivers and harbors where their swell and suction are likely to produce injury to other craft following their legitimate business, steamers must give heed to their presence, and by slowing, or stopping the engine temporarily, as the case may be, avoid doing them unnecessary damage."

In *The Majestic*, 44 Fed. 813, an ocean steamer, while passing up New York bay, passed a tug with heavily laden canal boats lashed on either side. A displacement wave produced by the steamer struck the tug and threw her with such force against one of the tows as to break in the side of the tow. The steamship had been running at a rate of eleven or twelve knots an hour but had reduced her speed to seven knots an hour. It was held by the district court that the steamer was liable for only one-half of the damage, because the tug had failed to turn so as to take the waves from the steamer end-on. But on appeal to the circuit court of appeals (*The Majestic*, 1 C. C. A. 78, 48 Fed. 730), the steamer was adjudged wholly liable for the injury. Said Judge Lacombe, speaking for the court of appeals: "The captain of the 'Majestic' testified that, at the lower rate of speed, her displacement wave would have no effect whatever at the distance of one thousand feet. The fact that the tug and the tows were in shallow water no doubt increased the swells, but it seems probable that the wave which did the damage was thrown off while at the higher rate of speed, and that the steamer passed considerably nearer than half a mile. Be that as it may, however, it is plain, upon the proof, that a wave was thrown up by the steamer, which made navigation unsafe for the canal boat, although she was, so far as appears, a proper craft to navigate the waters of the

upper bay, and was attached to her tug in a proper way for towing with the natural conditions of wind and waves, such as they were on that day. If, when moving at seven knots an hour, and the distance of half a mile, the 'Majestic' produces such results, then there is something in her size or build which makes it necessary for her officers to be watchful of craft they pass at that distance, as well as of those in the immediate vicinity, and to regulate her motions accordingly. It will not do to say that the swell she throws is no higher than such as are produced by a high wind in these waters. A high wind had not, on this particular day, rendered the bay unsafe for river craft. They were entitled to navigate there, and the proposition cannot be maintained that harbor waters may be put at all times and at all seasons in as perilous a condition for smaller craft, by the rapid movements of large ocean steamers, as they are occasionally by the prevalence of a gale of wind. Such waters are not to be appropriated for the exclusive use of any one class of vessels. We do not mean to hold that ocean steamers are to accommodate their movements to craft unfit to navigate the bay, either from inherent weakness, or overloading, or improper handling, or which are carelessly navigated. But of none of these is there any proof here, and, in the absence of such proof, we do hold that craft such as the libelants have the right to navigate there without the anticipation of any abnormal dangerous condition, produced solely by the wish of the owners of exceptionally large craft to run them at such a rate of speed as will insure the quickest passage. To hold otherwise would be virtually to exclude smaller vessels, engaged in a legitimate commerce, from navigating the same waters. Nor will it do to say that the 'Majestic' was navigating in the way and at the speed customarily adopted by vessels of her class. If such way and speed cause injury to a seaworthy craft of a kind properly in these waters, and properly handled, the custom will have to be modified, or the privilege paid for."

In *The Kaiser Wilhelm der Grosse*, 134 Fed. 1012, a large steamship passed near a dock at which a lighter was discharging. The displacement of waves by the steamer caused the lighter to dump a large part of her deckload. The steamer was going at the rate of about twelve nautical miles an hour. She was held guilty of negligence and liable for the damages resulting from her swells. There are two cases which do not agree with the general doctrines to be drawn from the above cases. Thus in *The Daniel Drew*, Fed. Cas. No. 3565, a canal boat in tow of the tug "Ohio" was injured by the suction of a passing steamer while both were navigating on the Hudson river. The steamer was going at its usual rate of speed and did not slacken speed when passing the tug and tow. Said the court: "These several steamboats were engaged in a lawful occupation, upon a great public highway, and by the use of lawful means. The Hudson river is a national watercourse, open to all who choose

to use it. The owners of the 'Ohio' had the right to navigate it with their steamboats and tows. The owners of the canal boats had the right to be towed thereon by the steamboat. The Daniel Drew was engaged in an occupation equally legitimate. Her owners had the same right to the use of the river for the purpose of carrying passengers upon their vessels, that the 'Ohio' and her tow had for their purposes. All had the right to its use, in the manner necessary for their lawful pursuits. The 'Ohio' occupied a much greater width of the stream than did the 'Drew.' The 'Drew,' on the other hand, requiring little room upon the surface of the river, found speed in passage indispensable to the success of its business, necessarily causing more swell and agitation than is made by the slower passage of a towboat. There is no law which limits the space a boat may occupy, or which prescribes how fast it may go, or how much swell it may cause, or how near it may pass to another boat. The rule of permission or of restriction depends in each case upon the reasonableness of the thing done. A dull sailing tow may not occupy unreasonably the entire channel of the river, and thus impede its navigation by all other vessels. A leviathan may not rush through the water with a speed that will overwhelm in its surges all the craft ordinarily to be found upon the river. Nor is a large vessel, under all circumstances, absolutely liable for an injury caused by its swells to an inferior vessel. The waters are open to the use of all kinds of crafts, large as well as small, and, while the rights of the smaller are to be carefully guarded, they are not to be made a pretense for excluding, or preventing the practical use of, larger or different vessels. Sea-going steamers move at a rapid rate of speed. They are large and bulky. They necessarily create much motion in the water. Vessels used in the bays and harbors and in the rivers near New York, for the carriage of passengers, are built for speed, and without speed their trade would soon come to an end. Their speed also creates much motion in the waters. Is there any rule of law which prescribes that these vessels shall absolutely be liable for injuries occasioned to smaller craft by a swell or motion caused by their passage through the water? Is there any greater or more stringent test of liability than that a large vessel shall use its large powers with care and diligence, and in the mode recognized by those accustomed to the business in which it is engaged, as being prudent and proper? If an overtaking and passing vessel, in prudent navigation, creates swells and suction, arrangements must be made that boats in a tow shall not be injured thereby. If the swell and suction created by the passing vessel are those to be expected in the ordinary navigation of a rapid vessel, which is managed with prudence and equipped and constructed in a suitable manner, and if the passing vessel has no reason to apprehend that she will do an injury, and a tow is injured thereby, the passing vessel is not responsible." This case is quoted with approval in *Bell v. New Jersey*

S. B. Co., 54 App. Div. 526, 66 N. Y. Supp. 1031, where it was held error to charge that in navigating rivers where small boats are accustomed to ply and may be reasonably expected, a steamboat is bound to navigate with caution and at a rate of speed sufficiently slow to avoid danger from her attending swells. But the rule announced in these two cases is opposed to the decided weight of authority, and in the recent case of *The Asbury Park*, 144 Fed. 553, the court referred to the "Drew" case and refused to follow it, saying that the later authorities had established a different rule. In this case the steamer "Asbury Park," while steaming up North river, passed a barge towed by a tug at a distance variously estimated at from three hundred to fifteen hundred feet, and though the steamer had reduced her speed her swells caused the barge to roll against the tug and was damaged. It was proved that the steamer generally passed tows at the reduced rate of speed at which she was going without injuring them, and had no reason to believe that she would cause injury to this tow, but she was nevertheless held liable.

b. Rowboats.—It is somewhat difficult to understand just what care the law requires of larger vessels to avoid imperiling rowboats by their swells, for the reason that rowboats are not classed as "vessels" within the steering and sailing rules embodied in the navigation laws of the United States. The rule requiring steamers to keep out of the way of sailing vessels and to slacken speed or stop their propellers or paddle-wheels when necessary to avoid endangering smaller craft is based mainly on the idea, as we have seen, that steamers are much more easily handled than sailing vessels, or vessels in charge of tows. But as rowboats, of all crafts, are the most easily handled, the reason for the rule which is applicable to other small craft would not seem to apply in the case of a rowboat. While the term "rowboat" does not occur in any of the cases quoted in the preceding subdivision of this note, no distinction seems to have been drawn by these cases between such craft and other small boats; and in the case of *Daniels v. Carney*, 148 Ala. 81, ante, p. 34, 42 South. 452, 7 L. R. A., N. S., 920, the inference is strong that the small craft which was capsized was a rowboat. There are numerous authorities, however, which hold that while it is the duty of a rowboat to keep out of the way of a steamer, the latter would not be justified in negligently running her down: *Wiggins Ferry Co. v. Redding*, 24 Ill. App. 260; *Conley v. Maine C. R. Co.*, 95 Me. 149, 45 Atl. 668; *Bigley v. Williams*, 80 Pa. 107; *Philadelphia etc. R. R. Co. v. Adams*, 89 Pa. 31, 33 Am. Rep. 721; *Fischer v. Camden Ferry Co.*, 124 Pa. 154, 16 Atl. 634; *Sekerak v. Jutte*, 153 Pa. 117, 25 Atl. 994; *Bulloch v. Lamar*, Fed. Cas. No. 2129; *The Mississquor*, Fed. Cas. No. 9649, 8 Ben. 6.

It does not appear, however, from these cases that a steamer is bound to guard against the effect of her swells upon rowboats, by

slackening her speed, changing her course, or stopping her paddle-wheels, as she is in the case of other small craft. For in *Fischer v. Camden Ferry Co.*, 124 Pa. 154, 16 Atl. 634, a rowboat occupied by boys, while crossing the Delaware river, was capsized by a ferry and one of its occupants drowned. The rowboat was directly across the path of the ferry and the accident could have been avoided had the rowboat been properly managed. While the court asserted that the ferry would not be justified in recklessly swamping the rowboat, it also declared that when a rowboat is discovered at such a distance that a few strokes of the oars would enable it to get out of the way, those in charge of the steamer would have the right to assume that those in charge of the rowboat will exercise the proper skill to avoid her, and that if the accident resulted from the ignorance of those in the rowboat, the steamer would not be to blame.

And in *Carter v. Seaboard Air Line Ry. Co.*, 151 Fed. 531, a young man, nineteen years of age, while passing up Elizabeth river in a batteau, was drowned as the result of a collision, between the batteau and one of the defendant's barges in tow of a tug. It was proved that the tug and tow were navigating too close to the piers and also going at too great speed and without sufficient lookout. But it also appearing that the batteau did not use proper precaution to get out of the way, the tug was only held liable for one-half of the damages assessed.

It would seem from the above cases that a steamer is not bound to observe the same care to avoid collision with rowboats as she is with reference to other craft, and therefore by analogy the rules governing her duty to avoid imperiling smaller craft by her swells would not appear applicable to rowboats.

ENGLE v. SIMMONS.

[148 Ala. 92, 41 South. 1023.]

MARRIED WOMAN, Action, When Proper in the Name of.—If, through the wrongful act of the defendant, a wife is thrown into a state of excitement, bringing on labor pains and resulting in miscarriage, an action is properly brought in her name. (pp. 60, 61.)

MARRIED WOMAN, Trespass Committed at Residence of, Leading to Injury to.—If a trespass is committed at the residence of a married woman and her husband, on account of which she suffers personal injury, it is not material whether the title to the property where she was residing was in her or in him. Whether it was in him or her, she may maintain an action for the injuries suffered by her. (p. 61.)

DAMAGES.—For Bodily Pain and Suffering of a Wife endured because of a wrongful act of another she may recover, though no physical violence was done to her person. (p. 61.)

OFFICER, When Liable for Injury to a Married Woman.—If an officer enters the dwelling of a married woman, then far advanced in pregnancy, and in the absence of her husband, for the purpose of collecting a claim against him, and being informed that he was absent and requested to leave the premises, refuses to do so and persists in interrogating her and in taking an inventory of the household effects, making at the time threats of what he intends to do, and she is thereby thrown in a state of nervous excitement, bringing on labor pains of unusual severity and the premature birth of the child, and causing physical disability for a long time, incapacitating her from the discharge of her household duties, such officer is liable to an action by her for the injuries thus suffered. (p. 62.)

John R. Sample and S. A. Lynn, for the appellant.

E. W. Godby, for the appellee.

⁹³ **DOWDELL, J.** This is an action by the plaintiff, appellant here, to recover damages for the wrongful act of the defendant, whereby she was caused to suffer great ⁹⁴ physical pain and consequent temporary physical disability. The complaint as amended contained five counts, to all of which a demurrer was sustained by the trial court, and, the plaintiff declining to plead over, a judgment was rendered in favor of the defendant.

The principal and important question in the case is: Does the complaint as amended state a cause of action? It is a sound and just principle of law that, where one in violation of the law does an act which in its consequences is injurious to another, he is liable for the damages caused by such wrongful act: *Van Norden v. Robinson*, 45 Hun (N. Y.), 567. The allegations of the complaint show that the defendant entered into the dwelling-house of the plaintiff, who was at the time far advanced in pregnancy, and in the absence of her husband, and with the evident purpose of collecting a claim against the husband, after being informed by the plaintiff that her husband was absent from home, and after having been requested by plaintiff to leave the premises, he refused without legal cause or good excuse to do so, persisting in interrogating the plaintiff and in taking an inventory of her household effects, making at the time threats of what he intended to do, whereby the plaintiff was thrown into a state of nervous excitement, bringing on labor pains at-

tended with unusual severity continuing for three days, and resulting in the premature birth of a child, and causing a physical disability to the plaintiff which for a long time incapacitated her for the discharge of her household duties. That the defendant violated the law in his refusal to immediately leave the premises when ordered to do so there can be no question, and that his subsequent conduct as alleged was wrongful is equally certain. The action was properly brought in the name of the wife: Code 1896, secs. 2523, 2527. The suit is for an injury to the plaintiff, and not for a trespass to the realty as supposed by appellee. It is wholly immaterial under the circumstances alleged whether the ownership of the premises was in the plaintiff or her husband, although it is averred that the possession of the dwelling was held under a contract of lease made by the wife. In *Watson v. Dilts*, 116 Iowa, 249, 93 Am. St. Rep. 239, 89 N. W. 1068, 57 L. R. A. 559, it was said: ⁹⁵ "Nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband, and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she ought to recover."

Nor is it important that no physical violence was done her person. The bodily pain and suffering which she endured was in direct line of causation from the alleged wrongful act of the defendant: *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 26 South. 349. In a case similar to the one under consideration the supreme court of Texas, in an opinion by Gaines, J., said: "That a physical, personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation in an action at law when the injury is intentional or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had. Here, according to the allegations of the petition, the defendant has produced a bodily injury by means of that emotion, and it is for that injury the recovery is sought": *Hill v.*

Kimball, 46 Tex. 210, 13 S. W. 59, 7 L. R. A. 618. In the case of Brownback v. Frailey, 78 Ill. App. 262, it was said: "One who goes to the house of a pregnant woman and flourishes a whip, and makes threats in a boisterous manner, is liable for her miscarriage and sickness resulting from fright proximately occasioned thereby, which fright he must have observed by the exercise of ordinary care, even though he did not know of the condition of her health." To the same effect are the following cases: Watson v. Dilts, 116 Iowa, 249, 93 Am. St. Rep. 239, 89 N. W. 1068, 57 L. R. A. 559; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848; Chicago & N. W. R. Co. v. Hunerberg, 16 Ill. App. 387; Newell v. Whitecher, 53 Vt. 589, 38 Am. Rep. 703. The plaintiff here was in her home, and had a right to the peaceful and undisturbed enjoyment of the same, and any unlawful entry or invasion thereof, ⁹⁶ which produced physical injury to her, whether by direct personal violence, or through nervous excitement the proximate result of the wrongful acts of the defendant, was a wrong for which she is entitled to recover.

It follows from the foregoing views that the trial court, in our opinion, erred in sustaining the demurrer to the amended complaint, and for which error the judgment appealed from must be reversed, and the cause remanded.

Reversed and remanded.

Haralson, Simpson and Denson, JJ., concur.

Damages for Fright and Mental Shock are discussed in the note to Gulf etc. Ry. Co. v. Hayter, 77 Am. St. Rep. 856. Nervous prostration arising from fright to a woman caused by stealthily entering her home in the night-time and committing a trespass on her husband's property justifies a recovery by her in damages against the trespasser: Watson v. Dilts, 116 Iowa, 249, 93 Am. St. Rep. 239, and see the cases cited in the cross-reference note thereto.

Where a Wife Sustains Personal Injuries through the wrongful or negligent act of another, her husband is entitled, by the common law, to recover such damages as he suffers from the loss of her services and society, and also the expenses of her sickness: Birmingham etc. Ry. Co. v. Linter, 141 Ala. 420, 109 Am. St. Rep. 40, and cases cited in the cross-reference note thereto.

HINTON v. FARMER.

[148 Ala. 211, 42 South. 563.]

TRUST—Legal Title, When Vests in the Beneficiary.—A conveyance to one person in trust for another vests the legal title in the beneficiary under the code of Alabama. (p. 63.)

HUSBAND AND WIFE, Acquisition of Her Title by His Adverse Possession.—A husband cannot acquire a prescriptive title to the lands of his wife while they hold joint possession. (pp. 63, 64.)

PRESCRIPTIVE TITLE in Favor of a Tenant by the Curtesy. The husband of a deceased owner of real property having as such a title therein as tenant by the curtesy cannot acquire prescriptive title as against the remaindermen. (p. 64.)

J. J. Mayfield and Foster & Oliver, for the appellant.

Henry A. Jones, for the appellee.

212 TYSON, C. J. We entertain the opinion that the deed from Ezekiel Anders, Jr., to Ezekiel Wright, trustee for Elizabeth Hall, conferred no title upon Wright **213** to the lands conveyed by it, but that the legal title to them passed under it into the beneficiary named in it, Mrs. Hall: Code 1896, sec. 1027, and authorities cited under it. There was, therefore, no error in admitting it in evidence.

Under the undisputed evidence it cannot be doubted that the plaintiffs, who are the only heirs at law of Elizabeth Hall, deceased, are entitled to recover, unless the defendant's deceased husband acquired their estate by adverse possession. Elizabeth Hall, from whom they derived title by descent, when she married Hinton in 1856, was the owner of and in possession of the lands. After their marriage Hinton lived with her upon them until her death in 1863. After her death he remained upon them, being entitled to the possession as a tenant by curtesy until his death in 1902. In 1858 he acquired a deed to the lands from certain parties who had no title whatever in them. After his first wife's death he intermarried with the defendant Mary J. Hinton, and in 1868 made her a deed to them. These two deeds were offered in evidence by defendant as color of title, but were excluded by the trial court. The theory of the defendant seems to be that the deeds should have been admitted as tending to show adverse possession of the lands by Hinton, the husband. If it be conceded that the husband, under any circumstances, can acquire

title to the lands of his wife by adverse possession, he certainly cannot do so by having a joint possession with her. One of the essential elements of adverse possession is that the possession must be exclusive. "Two persons cannot hold the same property adversely to each other at the same time": *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38, 28 South. 402; *Wells v. American Mortgage Co.*, 109 Ala. 430, 20 South. 136.

Nor was the subsequent possession of Hinton, after the death of his first wife, having life estate in the lands as tenant by curtesy, adverse to the plaintiffs, who owned the fee in the remainder. During his life at no time did their right of entry accrue. So long as his life estate in them endured, he was entitled to the possession; and it was not until his death that the right of the plaintiffs arose to sue for the establishment and recovery ²¹⁴ of their interest: *Edwards v. Bender*, 121 Ala. 77, 25 South. 1010, and authorities there cited.

There is no error in the record of which the appellant can complain, and the judgment appealed from must be affirmed.

Affirmed.

Dowdell, Anderson and McClellan, JJ., concur.

The Possession of a Life Tenant is never deemed adverse to the remaindermen: *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692; *Pryor v. Winter*, 147 Cal. 554, 109 Am. St. Rep. 162, and cases cited in the cross-reference note thereto.

Husband and Wife cannot Hold Adversely to each other while residing together on the same tract of land: *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38; *Bader v. Dyer*, 106 Iowa, 715, 68 Am. St. Rep. 332.

GRISWOLD v. GRISWOLD.

[148 Ala. 239, 42 South. 554.]

DEED, Delivery of to a Third Person for the Grantee.—A grantor may deliver a deed to a third person to be held until the grantor's death, and then delivered to the grantee, and such original delivery is good and vests title in the grantee, if there is no reservation of the right of the grantor to avoid or resume possession of the instrument. (pp. 65, 66, 67.)

WILL—Instrument in the Form of a Conveyance.—If an instrument was intended as a will and not as a deed, it must first be

proved and admitted to probate before it can have any operation. (p. 66.)

WILLS AND CONVEYANCES, Distinguishing Differences of. If an instrument cannot be revoked, defeated nor impaired by the act of the grantor, it is a deed, but if the title of the estate is dependent on his death, he retaining an unqualified power of revocation, it is a will. (p. 66.)

R. L. Harmon and D. S. Bethune, for the appellant.

J. D. Norman, for the appellee.

241 ANDERSON, J. While there was evidence that the grantor to the deed, who is the father of all the parties, informed the draftsman of the instrument that he wished to make a will, it is in form a deed; and, conceding that he signed it, knowing what it was, the question of delivery arises. "A grantor may deliver a deed to a third person, to hold until the grantor's death and then to deliver it to the grantee. Such a delivery is perfectly valid; but the deed must be left with the depository without a reservation by the grantor, express or implied, of the right to estop it or otherwise control its use": 9 Am. & Eng. Ency. of Law, 157, and numerous authorities there cited. Our own court, in the case of Fitzpatrick v. Brigman, 130 Ala. 450, 30 South. 500, speaking through Justice Tyson, said: "For so long as he reserves to himself the locus penitentiae, there is no delivery—no present intention to divest himself of the title to the property. We take it that the grantor need not expressly reserve to himself this right to repent; but if his act, upon which a delivery is predicated, does not place the deed beyond his control as matter of law then his right of revocation is not gone": Frisbie v. McCarty, 1 Stew. & P. 56; Foster v. Mansfield, 3 Met. 412, 37 Am. Dec. 154. There was evidence from which the jury could infer such a delivery of the instrument as the law requires to make it operate as a deed, and this question should have been submitted to them. The trial court properly refused the general charge requested by the defendants, and erred in giving the one requested by the plaintiffs.

Our attention is called in brief of appellee's counsel to the case of Richardson v. Woodstock, 90 Ala. 266, 8 South. 7, 9 L. R. A. 348, and especially to the following expression in the opinion: "A deed cannot be delivered **242** after the death of the grantor." This expression is in complete harmony with this opinion and all authorities on the sub-

ject. Of course, there could have been no valid delivery after the death of the grantor by either of the daughters, unless there was a valid delivery from the grantor to them, or one of them. There is nothing in the Richardson case (90 Ala. 266, 8 South. 7, 9 L. R. A. 348) to prevent a valid delivery of a deed by a grantor to a third person, to hold and deliver to the grantee after the death of the grantor.

It is suggested by counsel for appellee that the instrument in question is a will, and not a deed, and, if such is the case, would not defeat plaintiff's right to recover the land. If the instrument was intended as a will, and not a deed, not having been probated and proven, it could not operate to defeat the plaintiff's recovery. "The general characteristics which distinguish deeds from wills have been repeatedly declared; yet no definite, uniform test has been stated by which to determine the character and operation of each particular instrument, and none can well be. The intention of the maker is the ultimate object of inquiry—whether it was intended to be ambulatory and revocable, or to create rights and interests at the time of execution which are irrevocable. If the instrument cannot be revoked, defeated or impaired by the act of the grantor, it is a deed; but if the estate, title or interest, is dependent on the death of the testator—if in him resides the unqualified power of revocation—it is a will": Crocker v. Smith, 94 Ala. 295, 10 South. 258, 16 L. R. A. 576; Jordan v. Jordan's Admr., 65 Ala. 301; 30 Am. & Eng. Ency. of Law, 577.

The instrument upon its face purports to be a deed, but there is evidence that the grantor told the draftsman that he wished to make a will; yet, in the absence of any proof from which a contrary intention could be inferred, the instrument should be treated as a deed, provided there was such a delivery as is essential to constitute a valid delivery under the rule heretofore declared. It would therefore seem that, if the grantor made an irrevocable delivery of the instrument, it operated to pass the title to the grantees, and was a deed; ²⁴³ and this would be the case, notwithstanding it was not to be delivered to the grantee until after his death. If it was a deed, the title of the defendants should prevail. If there was no valid delivery, it could not operate as a deed and defeat plaintiffs' right to recovery. In case the jury should find that it was never delivered, so as to make it a valid deed, then it is needless for us to decide

whether or not it is a will, as that is a question to be settled in another forum. If a will, it would not avail the defendants in the case at bar, not having been probated and proven.

For the errors above designated, the judgment of the circuit court is reversed, and the cause is remanded.

Tyson, C. J., and Dowdell and McClellan, JJ., concur.

If a Grantor Delivers a Deed to a third person to be delivered by him to the grantee on the grantor's death, the grantee takes an immediate estate subject to the life use of the grantor: *Grilley v. Atkins*, 78 Conn. 380, 112 Am. St. Rep. 152, and see the cases cited in the cross-reference note thereto. The effect of placing a deed with a third person to be delivered to the grantee after the death of the grantor is discussed in the notes to *Brown v. Bakersfield*, 53 Am. St. Rep. 554; *Wilson v. Carrico*, 49 Am. St. Rep. 219.

The Distinction Between a Deed and a Will is discussed in the note to *Ferris v. Neville*, 89 Am. St. Rep. 486. A conveyance to take effect on the grantor's death is not testamentary in character, and does not operate as a will: *O'Day v. Meadows*, 194 Mo. 588, 112 Am. St. Rep. 542.

EX PARTE OWENS.

[148 Ala. 402, 42 South. 676.]

ELECTION to Change County Seat—Majority of Voters Voting on the Question is Sufficient.—Under a constitution providing that no courthouse or county seat shall be removed except by a majority vote of the qualified electors of the county voting at an election held for such purpose, it is not necessary that there be a majority of the electors of the county voting in favor of the removal. All that is required is a majority of the persons voting at the election. (pp. 68, 69.)

CONSTITUTIONAL LAW—Classification of Counties as Subjects of Elections for Changing County Seats.—A statute authorizing and regulating elections for changing the location of courthouses and county seats need not apply to all the counties of the state. They may be classified according to their several needs and conditions. It would be manifestly unjust to provide for an election on the same terms and conditions in a county which has just paid large sums of money and assumed heavy obligations to build a courthouse and jail, as in a new county which had neither. (p. 69.)

CONSTITUTIONAL LAW.—To Authorize the Court to Declare a Statute Unconstitutional, it must be found obnoxious to the express provisions or necessary implication of some article of the constitution, and the court will not declare a statute unconstitutional because it is opposed to the spirit supposed to pervade the constitution, or is contrary to the principles of right. (p. 72.)

ELECTION—Secrecy is not Essential to a Ballot.—An election by ballot is not necessarily secret. (p. 73.)

ELECTIONS.—A Ballot is a little ball or a printed or written ticket used in voting. (p. 73.)

ELECTION—Secrecy of Ballots—Numbering of Ballots.—A statute providing for the numbering of ballots to correspond with the numbers on the poll lists is not unconstitutional as invading the secrecy of elections under a constitution providing for elections by ballot. (p. 76.)

Whitson & Dryer, for the petitioner.

Knox, Acker & Blackmon, for the respondent.

⁴⁰⁵ SIMPSON, J. This is an application for a writ of prohibition, to be directed to Honorable John Pelham, judge of the circuit court in Cleburne county, to prohibit and restrain him from proceeding to try said Bud Owens, on the ground that the county seat of said county is at Edwardsville, and not at Heflin, in said county, where the court is being held. The alternative writ is waived, and Judge Pelham answers, basing his authority to hold said court at Heflin on the act of March 3, 1903, and the election held thereunder, so that the entire contention rests upon the proposition as to whether or not said act is valid. This act was before this court heretofore, and the court, after full consideration, held that the act is a general law, that it was properly enacted, and a valid law: *State v. Porter*, 145 Ala. 541, 40 South. 144. We are satisfied with that decision, and shall not enter into any of the questions therein litigated.

It is insisted now that the act in question is violative of section 41 of our constitution, which provides that "no courthouse or county site shall be removed except by a majority vote of the qualified electors of said county voting at an election held for such purpose," because section 17 of the act (Acts 1903, p. 124) provides that "if, upon a canvass of the returns of said election, it shall be ascertained and declared that a majority of all the legal votes cast were in favor of the removal of the county seat, then the city, town, or village thus selected shall thereafter be the county seat"; the contention being ⁴⁰⁶ that, under said section of the constitution, it requires a majority of all of the qualified electors of said county to vote for the proposition in order to carry it, without regard to the number of votes actually cast. Without dwelling on the improbability of the constitution makers enacting a law with such an uncertain quantity in it as a determination of just how many qualified electors were in a certain county at a given time, with no record of the deaths or removals that may have occurred up to the

date of the election, we think the language of the section itself is very clear that it is only a majority of those who vote that is required. Whether there be, or not, the distinction contended for between the words "voter" and "elector," it matters not. The removal is by "a majority vote." That of itself, if nothing else was said, would carry with it the idea of a majority of the votes; but it says "a majority vote" of whom? If it means of the qualified electors of the county, the word "voting" should be left out. It cannot mean anything else than that it is, as it states, "of the electors voting at an election held for such purposes." It cannot be the majority vote "voting"; for that would be absurd. It cannot be the majority voting; for "majority" is an adjective, qualifying "vote." There is nothing else for the word "voting" to qualify, except "electors"; and it is the equivalent of a majority of the electors who vote. We regard this as the plain and reasonable interpretation of the section, and it is unnecessary to multiply authorities on this point.

It is next insisted that said act is violative of section 190 of our constitution, which provides that "the legislature shall pass laws, not inconsistent with this constitution, to regulate and govern elections, and all such laws shall be uniform throughout the state, and shall provide by law for the manner of holding elections and of ascertaining the result of the same." This provision has reference particularly to the general election laws of the state; but, conceding that it applies to laws providing for elections in the various counties, this law makes provision for all of the counties according to their several needs, and in providing for so many counties, differently situated, it is necessary that they be ⁴⁰⁷ classified according to their several needs and conditions. It would be manifestly unjust to provide for an election on the same terms and conditions in a county which had just paid large sums of money and assumed heavy obligations to build a courthouse and jail, as in a new county which had neither. This principle of classification has been so often recognized as not impinging upon the principle of the uniformity of laws that it is unnecessary to discuss it at length. This is not violative of section 190 of our constitution: *Harwood v. Wentworth*, 162 U. S. 547, 16 Sup. Ct. Rep. 890, 40 L. ed. 1069; *Bone v. State*, 86 Ga. 108, 12 S. E. 205; *People v. Hazelwood*, 116 Ill. 319, 6

N. E. 480; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413.

It is next insisted that section 179 of our constitution implies absolute and inviolable secrecy in voting, not only at the time of casting the ballot, but for the future, and that the act in question violates this provision of our constitution. As this insistence is very urgent, and supported by quotations from a number of cases, we have examined them with great care, and find that, in the greater number of them, the real point in controversy was not before the court, and these dicta are mainly remarks of the court in cases which sustained the constitutionality of various statutes, which were supposed to impinge on similar constitutional provisions. In the case of *State v. Shaw*, 9 S. C. 94, the only point decided was that, when the constitution required judges to be elected by joint ballot, it did not mean viva voce voting. In the case of *State v. Barden*, 77 Wis. 606, 46 N. W. 899, 10 L. R. A. 155, the point decided was that the printing of the word "judiciary" on the ballots cast for one candidate, and not on those cast for another, did not invalidate the ballots; the court saying: "It is not the ballot itself that is at fault, but the use made of it": 77 Wis. 608, 46 N. W. 901. And this, notwithstanding the statute prohibited any device, etc., on the ballot. *State v. Anderson*, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239, decided that a candidate's name could not be placed on the ticket twice because he had been nominated by two parties,⁴⁰⁸ and that a statute providing for an official ballot was not unconstitutional because it deprived the voter of the right to make out his own ballot. *State v. Anderson*, 26 Fla. 240, 8 South. 1, decides that, where a municipal ordinance provided for separate boxes, plainly marked, for the different offices voted for, and that the ballot should contain nothing but the name of the officer voted for, ballots placed in the proper box, but not having the name of the office to be filled, should be counted. *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045, 28 L. R. A. 683, decides that, first, the legislature may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent fraud, intimidation, etc.; and, second, the requirement that the ballots shall be numbered is mandatory, and not unconstitutional. The remarks quoted by counsel are in regard to the interpretation of the

Kansas statute, and not of any constitutional provision: 55 Kan. 14, 49 Am. St. Rep. 233, 39 Pac. 1049, 28 L. R. A. 683. *Ex parte Arnold*, 128 Mo. 256, 49 Am. St. Rep. 557, 30 S. W. 768, 1036, 33 L. R. A. 386, decides that the court cannot compel the production of the ballot-box before the grand jury, under a constitution which provided for numbering the ballot, and forbade the officers to make known how the elector voted, except in contests of election: 128 Mo. 261, 49 Am. St. Rep. 557, 30 S. W. 769, 33 L. R. A. 386. *Pearson v. Supervisor*, 91 Va. 322, 21 S. E. 483, decides that a statute providing for a constable to aid blind men in preparing their ballots was not unconstitutional; the court remarking that, "while the vote by ballot implies a secret ballot, etc., yet the main object, which is the right to vote, must not be defeated by a too rigid observance of the incidental right, which is that of secrecy": 91 Va. 334, 21 S. E. 485. *Temple v. Mead*, 4 Vt. 535, simply held that a printed ballot was valid. *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141, merely passes upon the effect of several irregularities under the statute. No constitutional question is decided. *Attorney General v. Detroit*, 58 Mich. 213, 55 Am. Rep. 400 675, 24 N. W. 887, decides that the requirement of the statute that the election inspectors must be of different political parties is unconstitutional, principally upon the ground that it is a superadded qualification test for office.

Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97, does decide that an act providing for numbering the ballot is unconstitutional, and for authority cites Judge Denio's dissenting opinion in *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242, to the effect that "the spirit of the system requires that the elector should be secured then, and at all times thereafter"; also *Temple v. Mead*, 4 Vt. 535, and *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141. The opinion, on these authorities, holds that the provision is "contrary to the spirit and substance of the constitutional provision." The case of *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825, does decide that a statute requiring ballots to be numbered is violative of a similar constitutional provision, on the theory that a vote by ballot implies complete and inviolable secrecy. As authorities for this decision, several of the cases *supra* and a few others are cited; but upon an examination of them we find them to be expositions of statutes, without reference to constitutional interpretation—the question as to whether a

witness may be compelled to tell how he voted, etc., which do not throw any light on the interpretation of the constitutional provision. The case of *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670, is based upon a constitutional provision requiring elections to be by "secret ballot," and especially provided that "secrecy in voting shall be preserved." And the point decided is that a statute providing for numbering the ballot, and permitting the number to be revealed only in case of a contested election, is not a violation of the constitution; and the court says: "While we are of opinion that a law might be framed better adapted to secure a secret ballot, we are disposed to hold the present law valid, notwithstanding this objection": 14 Utah, 356, 47 Pac. 673. In the said case the two associate judges concur in the result, but differ from the chief justice on the validity of said provision requiring the numbering of the ballot, and emphasizing the different wording of their constitution, ⁴¹⁰ which requires a "secret ballot" and also provides that "secrecy shall be preserved."

In passing upon a constitutional question, there are certain fixed principles which should be kept in mind. At an early day in the constitutional history in this country the question was fully discussed, and finally settled by the highest authorities in the land, that, in order to authorize a court to declare an act violative of a state constitution, it must be found obnoxious to the express terms or necessary implication of some article of the constitution, and the court cannot declare a statute unconstitutional because it is opposed to the "spirit supposed to pervade the constitution," or "contrary to the first principles of right," etc. The courts cannot go beyond the "natural and obvious sense" of the constitutional provision. Beyond the plain wording and necessary implications of the constitution, the carrying out of the general spirit, or conserving the principles of right, becomes a matter of legislative discretion, and not of judicial interpretation. "Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too undefined, either for its own security or the protection of private rights": Cooley's *Constitutional Limitations*, 7th ed., pp. 239-242, and cases cited in note. Our constitutional provision is simply that "all elections by the people shall be by ballot, and all elections by persons in a representative capacity shall be viva voce": Const., sec. 179.

If we look to the definition of the word "ballot," we find that it runs back as far as to ancient Greece, and was derived from the Greek word "ballo," to throw, and was originally applied to the casting of balls, shells, pebbles, or beans into a box, as the means of deciding, or voting, in both legislative and judicial bodies. It was not always secret, as it is said that the Grecian assemblies and courts were held in the day-time in public places, and the voters were separate from the popular audience only by a cordon of ropes, and when the voters went up and deposited their ballots it was known how they voted: 2 Am. Ency. 541. It is unnecessary to go into the learning on this subject, bringing it through the laws of the Romans and the French. Suffice ⁴¹¹ it to say that the balls, pebbles, etc., have been succeeded by the paper ballot, which is placed in the box, and, although it may be admitted that the spirit or general purpose of balloting is in the direction of secrecy, yet, as to the extent of that secrecy, and the means of preserving it, that is a matter of legislative discretion. The member of a society votes by ballot, although the officer who carries the box around may see whether he drops in a white marble or a black one, and the man who folds his ticket and drops it into a box, or hands it to an officer to drop it in for him, certainly votes by ballot; and it is for the legislature, governed by public policy, and in carrying out the spirit and general purpose of the constitution, to make such regulations as it may deem best for the preservation of the secret thereafter.

The ballot is simply "a little ball a printed or written ticket used in voting," etc.; "an act of voting by balls or tickets, by putting the same into a box or urn," and thus "a secret method of voting": 5 Cyc. 225. "A ticket or slip of paper, sometimes called a 'voting paper,' on which is printed or written an expression of the elector's choice; a method of secret voting by means of small balls, or printed or written ballots, which are deposited in an urn or box, called a 'ballot box'": Century Dictionary. In these and a number of definitions collected in 1 Words and Phrases, pages 680, 681, the same idea is predominant—that the ballot is the instrument used in the act of voting, and by using it in that way it is considered a secret mode of voting, as distinguished from a viva voce vote. As to what may be done thereafter is clearly left to legislative discretion.

Resorting to the history of this provision of our constitution and the legislative construction of it, it is clear that it has not been understood as involving the interpretation adopted by the supreme courts of Minnesota and Indiana. This provision has been in all of the constitutions of Alabama, from the original constitution of 1819 to the present time, in practically the same language. Yet it is common knowledge that, up to the time of Acts of 1878-79, page 78, the ballots were always numbered and the ballots and the poll lists sent up together ⁴¹² (see Code 1876, secs. 271-280), and until a recent period voters made out their own ballots on any paper, and with any device desired. It must be presumed that, if our constitution makers had desired to embody in the fundamental law of 1901 any further restrictions or requirements, they would have been expressed in apt words, and not by the adoption of the old expression, which had never been so understood. When we come to examine the act (Acts 1903, p. 117), we find it provides for a paper ticket, which may be either printed or written (section 9); for numbering the ballots to correspond with the numbers on the poll list (section 10); that the inspectors shall count the votes, certify the poll lists, and send "statements of the vote and poll lists, together with the ballots cast," securely sealed up and properly indorsed, in an envelope or wrapper, by the returning officer to the board of commissioners at the courthouse (section 14); and at the time appointed the commissioners "shall make a correct statement from the returns, in the presence of such persons as may choose to attend" (section 13). Thus it will be seen that the ballots are in the hands of sworn officials from the casting to the counting, and there is no provision looking to an examination of the ballots, except that they shall reject any ballots shown to be illegal. The act is not violative of section 179 of the constitution.

It thus appears that Heflin is the place fixed by law in which the courts of said county should be held, and a decree will be here rendered denying the petition.

Weakley, C. J., and Haralson, Dowdell and Anderson, JJ., concur.

SIMPSON, J., on Rehearing. While it is true that if a clause of a constitution of a sister state, after having been construed by the highest court of that state, is copied for the first time into a constitution adopted by our own state, the

presumption is that we adopted it with its construction, yet this principle has no application to a case like this one, where the constitutional provision was in our own previous constitution, so that it cannot be said to have been taken from the constitution of the sister state. While, as this court has said, we are ⁴¹³ "authorized to consult them (the decisions of the highest courts of other states) as other reported cases to aid us in arriving at correct conclusions," yet we "are not permitted to regard them as authoritative and binding expositions." And this language was used, even where the court was construing a statute of said sister state and the decision was not introduced in evidence: *Nelson v. Goree's Admr.*, 34 Ala. 565. It is the province of the highest court of each state to construe its own constitution: 26 Am. & Eng. Ency. of Law, 2d ed., pp. 175, 176. Even the decisions of the supreme court of the United States are not binding upon this court, unless it be in those matters in which said court has appellate jurisdiction: 26 Am. & Eng. Ency. of Law, 2d ed., pp. 175, 176. This court accords the utmost respect to the decisions of the highest courts of our sister states, but reserves to itself the right to determine whether they are based upon sound reasoning when applied to our own constitution and laws. Especially can we not follow them when our own legislative and judicial history has placed a different construction upon them.

It is true, as suggested by counsel for the petitioner, that our constitution of 1819 did provide that the vote should be by ballot "until the General Assembly shall otherwise direct"; but it is also true that the General Assembly never did "otherwise direct." When the statutes provided for the numbering of the ballots, there is nothing to indicate that the legislature thought it was changing the mode of voting from voting by ballot to any other mode; but, on the contrary, it was always the "ballots" that were numbered, and no legislature or court of the state seems to ever have had the least idea that we had ceased to vote by "ballot" because they were numbered. This clause was left off the section in the constitution of 1868, and we continued to have the same kind of numbered ballot, without any safeguards against the ascertainment of the voter's choice, and so it continued under the constitution of 1875, until 1878, when the law was changed, for reasons which it is not necessary to rehearse.

The provision to the constitution of Texas, in place of sustaining the contention of counsel, that the lawmakers of that state understood that the use of the word ⁴¹⁴ "ballot" meant such secrecy as to prohibit its being numbered, rather shows the contrary; for that provision is that "in all elections by the people the vote shall be by ballot, and the legislature shall provide for the numbering of the tickets": Const. Tex., art. 6, sec. 4. Thus the voting by ballot and the requirement that they shall be numbered are coupled together by "and" (and not by "but"), indicating clearly that it was not intended as a modification of the word "ballot"; but they still vote by ballot without qualification, and it is made the duty of the legislature to provide that the ballot shall be numbered. Judge Cooley says that "a ballot may be defined to be a piece of paper or other suitable material, with the name written or printed upon it of the person to be voted for," and that the "voter is thus enabled to secure and preserve the most complete and inviolable secrecy": Cooley's Constitutional Limitations, 7th ed., p. 910. The use of the word "thus" shows conclusively that it is the voting in the manner described which enables him to secure the secrecy, and, although he does go on to remark on the "spirit" of the provision, etc., yet he is speaking of the duty of the legislature, and not of the constitutionality of the act under the constitution. Nowhere does he declare that an act which does not provide absolutely against all contingencies by which the choice of the voter can be ascertained is violative of the constitutional provision, but, on the contrary, he goes on to discuss devices which are adopted to ascertain how the voter has voted, and says that, while they may not render the election void, they are reprehensible, etc.: Page 912.

The rehearing is denied. The entire court sitting and concurring in overruling the motion for a rehearing.

ANDERSON, J., Concurring. While I concur in the conclusion reached in this cause in affirming the appeal and in denying the application for rehearing, I do so for reasons entirely different from those given in the opinion of Justice Simpson. Regardless of the origin or derivation of the word "ballot," the expression "election by ballot" has been expounded and construed by the various courts of last resort, and with entire unanimity they have declared it meant a secret ballot, and that the ⁴¹⁵ essential principle of this man-

ner of voting was to protect the secrecy of the ballot, in order to guard and protect the voter against intimidation, secure to him absolute freedom in the exercise of the elective franchise, and reduce to a minimum the incentive to bribe the voter: 3 Am. & Eng. Ency. of Law, 768, and other authorities cited on second page of brief on application for rehearing.

The constitution contemplates, not only that secrecy be preserved at the time of voting, but that it be sacredly guarded for all time, unless the voter himself shall voluntarily divulge it. In Cooley's Constitutional Limitations, fifth edition, page 762, the author says: "The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases, and with what party he pleases, and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others, who may accidentally, or by trick or artifice, have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it. His ballot is absolutely privileged, and to allow evidence of its contents, when he has not waived the privilege, is to encourage trickery and fraud, and would, in effect, establish this remarkable anomaly: that while the law, from motives of public policy, establishes the secret ballot, with a view to conceal the elector's action, it at the same time encourages a system of espionage by means of which the veil of secrecy may be penetrated, and the voter's action disclosed to the public." So in McCrary on Elections, section 453, it is said: "The secret ballot is just regarded as an important and valuable safeguard for the protection of the voter, and particularly the humble citizen, against the influence which wealth and station may be supposed to exercise. And it is for this reason that the privacy is held not to be limited to the moment of depositing the ballot, but ⁴¹⁶ is sacredly guarded by the law for all time, unless the voter himself shall voluntarily divulge it." In Paine on Elections, section 453, the author states the law as follows: "A constitutional provision that all elections shall be held by ballot guarantees the secrecy of the ballot, and is violated by a statute

requiring the tickets to be numbered to correspond with the voters' numbers on the poll list."

It has been pointedly held in the cases of *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825, *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97, and *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670, that a statute requiring the numbering of the ballot and the keeping of corresponding poll lists was violative of the constitution, inasmuch as said statute destroyed the secrecy of the ballot. The writer has been unable to find a single authority to the contrary. On the other hand, the framers of the constitutions of Pennsylvania (1873), of Missouri (1875), and of Colorado (1876), realizing, no doubt, that the numbering of the ballot would be violative of the old constitution, expressly provided that, while elections should be by ballot, the tickets should be numbered. I do not wish to be understood as holding that an act requiring the numbering of the ballot under any and all conditions would be violative of the constitution. The purpose of the constitution is to preserve the secrecy of the ballot, yet a statute might require the numbering of the ballot and at the same time preserve its secrecy, by imposing certain duties upon the election officers, such as destroying the ballots before comparison with the poll list, etc.; and this point was doubtless not considered by the courts when considering the numbering of the ballots, else the respective acts construed may have had no provision for preserving the secrecy, notwithstanding the ballots were to be numbered.

Acts of 1903, page 122, section 10, provides for a numbering of the ballots and the keeping of corresponding poll lists, and the act nowhere provides for a destruction of the ballots or forbids a comparison. How each voter voted can be ascertained by the election managers or commissioners without a violation of law on their part, by a comparison of the ballots with the poll list, and said section 10 is clearly violative of section 179 of the constitution ⁴¹⁷ of 1901, in so far as it requires a numbering of the ballot. "The rule is well established, and founded in the highest wisdom. Because, however, a small portion of an act is invalid, it does not necessarily follow that the whole act is void. All that portion of the act which is not repugnant to the constitution is valid. While the numbering of the ballots was improper, still that circumstance should not have the force to avoid the act and overturn the election. The electors were not responsible.

Their ballots were honestly cast, and there has not been sufficient reason shown why they should not have been counted": *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670. The manifest design of the constitution in preserving the secrecy of the ballot is for the protection of the voter, and, while he cannot complain because of the numbering of his ballot, and could doubtless use the courts to enforce his constitutional right to vote secretly, yet, when he casts his vote without protest, the courts will not deprive him of same, simply because the managers, in compliance with an unconstitutional requirement of the act, numbered the ballot. This court, without determining the constitutionality of the general election law in this respect, has held that the section requiring the numbering of the ballot was merely directory, and that a failure to comply therewith on the part of the election officers did not affect the ballots cast which were not numbered, or the result of the election: *Montgomery v. Henry*, 144 Ala. 629, 39 South. 507, 1 L. R. A., N. S., 656.

There is nothing in the statute invalidating the ballots when honestly cast without having been numbered, or in the constitution invalidating them because they were numbered; and the doing of or leaving undone something merely directory will not affect the result or annul the election, if there is enough left in the act providing for the holding of same with the unconstitutional portion eliminated. The case of *Brisbie* (26 Minn. 107, 1 N. W. 825), wherein the statute requiring the numbering of the ballot was construed, was an action on the part of the elector against the election judges for refusing to let ⁴¹⁸ him vote without numbering his ballot. The Indiana case of *Stein* (38 Ind. 89, 10 Am. Rep. 97) was an action by an elector against the election managers for numbering his ballot against his protest. The proceeding in the case at bar is not by an elector, complaining that his ballot was improperly numbered, but by a defendant, under indictment, protesting against being tried at Heflin, the county site, because the election fixing the county site at said point was carried by ballots which were numbered in violation of the constitution. This fact did not render the election void. "A mere irregularity in conducting an election, which deprives no legal voter of his vote and does not change the result, never has been held to invalidate an election. The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the election

franchise, to prevent illegal votes, and to ascertain with certainty the result. Such rules are directory merely, and not jurisdictional or imperative": *Hodge v. Linn*, 100 Ill. 397; *Platt v. People*, 29 Ill. 54.

The supreme court of Missouri, a state with a constitution permitting the numbering of the ballots and with a statute requiring that they be numbered, and which further provided that ballots not numbered could not be counted, in case of *State v. Mullix*, 53 Mo. 355, held, in an election contest, that the ballots not numbered should not have been counted and that the statute was not merely directory, because it expressly required that the ballots should be numbered, and not counted unless they were. We have nothing in our organic law or statutes striking down ballots because numbered or not numbered. Therefore the doing of the one or leaving undone the other is merely directory, and neither of which invalidates the election.

The "Majority of the Electors" referred to in a constitution as requisite to the ratification of an amendment thereto means the majority of the electors voting upon the question of amendment, and not a majority of all the electors of the state or of those voting at the election: *Green v. State Board of Canvassers*, 5 Idaho, 130, 95 Am. St. Rep. 169. See, too, *Fox v. Seattle*, 43 Wash. 74, 117 Am. St. Rep. 1037.

The Legislature may make Reasonable Regulations for Conducting Elections, so long as the voters are permitted to vote by ballot and in absolute secrecy for the candidates of their choice: *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, and note; note to *Chamberlain v. Wood*, 91 Am. St. Rep. 685. As to the meaning of a "secret ballot," see the recent cases of *Detroit v. Board of Inspectors of Election*, 139 Mich. 548, 111 Am. St. Rep. 430; *Helme v. Board of Election Commissioners*, 149 Mich. 390, 119 Am. St. Rep. 681.

COLLINS v. GILLESPY.

[148 Ala. 558, 41 South. 930.]

INFANTS.—The Next Friend of an Infant has No Authority to receive payment or to enter satisfaction of a judgment in favor of an infant. (p. 81.)

Petition in the case of Mamie Collins, a minor, by her next friend and father against the Birmingham Railway Light and Power Company that John G. Gillespy, a clerk of the court, be ordered to pay twenty-five dollars received by him in satisfaction of a judgment in such action to such next friend. A demurrer to the petition was sustained, and the petitioner appealed.

Ward & Drennan, for the appellant.

J. S. Gillespy, pro se.

⁵⁵⁹ DENSON, J. "It is the general rule that no one but a regularly qualified guardian of an infant has authority to receive payment and enter satisfaction of a judgment recovered in favor of such infant, and that a next friend has no such authority." And although there are authorities which seem to take the contrary view, this court has decided that a next friend has no such authority: ⁵⁶⁰ Isaac v. Boyd, 5 Port. 388; Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429; 17 Am. & Eng. Ency. of Law, 2d ed., 859, and cases in note 10. See, also, with respect of the office of a *prochein ami*, the following cases: Thomason v. Gray, 84 Ala. 559, 4 South. 394; Cook v. Adams, 27 Ala. 294; Cooper v. Maclin's Heirs, 25 Ala. 299; Riddle v. Hanna, 25 Ala. 484; Klaus v. State, 54 Miss. 644; Mitchell v. Connolly, 1 Bail. (S. C.) 203. If the next friend has not the authority to receive payment or enter satisfaction, it follows logically that an attorney who derives the only authority he has from the next friend is not clothed with such authority.

There is no error in the record, and the judgment of the court must be affirmed.

Weakley, C. J., and Haralson and Dowdell, JJ., concur.

The Extent of the Authority of a Guardian ad litem or next friend of an infant is the subject of a note to Fletcher v. Parker, 97 Am. St. Rep. 995.

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BEAUVOIR CLUB v. STATE.

[148 Ala. 643, 42 South. 1040.]

CONSTITUTIONAL LAW—Title of Statutes.—When the title of a statute contains one general subject, which is clearly expressed, such as "To prohibit the sale of liquor on Sunday," it may in the body include a provision for all matters germane and referable to that subject. (p. 83.)

CONSTITUTIONAL LAW—Title of Statute.—The subject of penalizing the keeping open of a barroom or other place for the sale of liquors on Sunday is included in the general title of a statute, "To prevent the sale of liquor on Sunday." (p. 83.)

CONSTITUTIONAL LAW—The Police Power.—Statutes undertaking to limit the sale of liquors on Sunday must be referred to the police power, and, if sustainable, must be sustained as an exercise of that power. (pp. 84, 85.)

CONSTITUTIONAL LAW—Regulation or Prohibition of the Sale of Intoxicating Liquors.—The traffic in intoxicating liquors is a proper subject of police regulation, and may be controlled, restricted or even prohibited, without violating any constitutional right, and this rule applies to social clubs. (p. 84.)

INTOXICATING LIQUORS—Social Clubs.—A transaction whereby an incorporated social club sells intoxicating liquors to one of its members is within the meaning of the statute prohibiting the sale of intoxicating liquors without a license or prohibiting the sale of intoxicating liquor on Sunday. (p. 84.)

CONSTITUTIONAL LAW—Sunday Laws.—It is within the exercise of the police power for the legislature to enact laws against keeping open on Sunday places for the sale of intoxicating liquors, whether such sales are for profit or not. Nor is it material whether the sales are public or private, provided the places are kept open therefor. (pp. 84, 85.)

CONSTITUTIONAL LAW—Constitutionality of Statute, How Raised.—A general suggestion that the provisions of a statute are unconstitutional and void is permissible as a way of presenting the constitutionality of the statute. (p. 86.)

CONSTITUTIONAL LAW—Special Legislation—Statutes Undertaking to Make Sales of Intoxicating Liquors by One Club Lawful. A statute undertaking to make lawful the sales of intoxicating liquors by a social club under circumstances where like sales by other social clubs are unlawful, is unavailing as against a constitution providing that the operation of no general law shall be suspended by the general assembly for the benefit of any individual, corporation or association. (pp. 87, 88.)

CONSTITUTIONAL LAW—Privilege of not Answering Incriminating Questions is Personal.—That a witness was improperly compelled to answer, and did answer, incriminating questions, against the objection of the defendant in a criminal prosecution, cannot be urged by such defendant in the appellate court. (pp. 88, 89.)

Indictment and conviction of the Beauvoir Club for keeping open its clubrooms on Sunday for the selling of intoxicating liquors. The defendant appealed.

Marks & Sayre and Rushton & Coleman, for the appellant.

Massey Wilson, attorney general, for the state.

⁶⁴⁶ DENSON, J. The indictment is in the following language: "The grand jury of said county charge that, before the finding of this indictment, Beauvoir Club, a corporation, did on Sunday unlawfully keep open a clubroom for the sale of spirituous, vinous or malt liquors, ⁶⁴⁷ against the peace and dignity of the state of Alabama." It is founded on the act of the legislature entitled "An act to prohibit the sale of liquors on Sunday," approved February 23, 1903 (Pamph. Acts 1903, p. 64). The defendant demurred to the indictment on the ground, among others, that "so much of said act as undertakes to penalize the keeping open of a barroom or other place for the sale of liquors on Sunday is violative of the constitution, in that the same is not clearly expressed in the title of the act." In respect to this act we said in a former case: "The title of the act is in a sense general and contains but one subject, 'To prohibit the sale of liquor on Sunday.' This is clearly expressed. Everything contained in the several sections is directed to the subject of the law as expressed in the title, and we think plainly and unquestionably germane and referable to the subject. Whenever this is the case, the act cannot be said to be offensive to section 45, article 4 of the constitution": *Borck's Case* (Ala.), 39 South. 580; *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224. So it seems that this contention of the defendant is concluded by *Borck's case*. Being satisfied with that decision and in adherence to it, we hold that the trial court properly overruled the third and fourth grounds of the demurrer.

But it is insisted that, even though the first clause of the act, the one on which the indictment is based, is a valid enactment, yet it has no reference to private social clubs, and therefore the indictment charges no offense. The argument by the defendant in support of the insistence is that the act is a police regulation; that such regulations are made with reference to the conduct of individuals in its bearing on the public; that to promote the public welfare is the sole justification for the curtailment of personal liberties and the regulation of individual acts; that the place is kept open, not for the benefit of the public, but of the members of the club; that, if sales of liquor are made on Sunday by the club to

its members in its rooms, this is not an act or acts which affect the public welfare—there is no point of contact with the public—and, therefore, not within the legitimate exercise of the police power. There can be no doubt ⁶⁴⁸ that the legislation in question must be referred to the police power of the legislature. Whatever differences of opinion may exist as to the extent and boundaries of this power, and however difficult it may be to render a satisfactory definition of it, there seems no doubt that it does extend to the protection of the lives, health and property of citizens, and the preservation of good order and the public morals. These objects belong emphatically to that class which demand the application of the maxim, “*Salus populi suprema lex*,” and they are to be attained and provided for by such appropriate means as the legislature may devise; and while the determination of the legislature as to what is a proper exercise of its police powers in relation to such objects is not final or conclusive, but is subject to the supervision of the courts, yet the traffic in intoxicating liquors is universally recognized as a proper subject for police regulation, and may be controlled, restricted or even totally prohibited, without violating any constitutional right: *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; 23 Cyc. 65, and cases in notes 64, 65, and 66.

So far as the demurrer to the indictment is concerned, this court is committed to a doctrine that a transaction whereby an incorporated social club sells intoxicating liquors to one of its members is a sale technically and within the meaning of a statute prohibiting the sale of vinous, spirituous, or malt liquors, without a license: *Markin v. State*, 59 Ala. 34; *Manassas Club v. City of Mobile*, 121 Ala. 561, 25 South. 628. The evil intended to be corrected by the act in question is the keeping open on the Sabbath day of barrooms or other places where liquors are furnished and drunk, and it can make no difference whether few or many persons can obtain admission and buy or obtain the liquors in the club, or whether other people may or not see them buy the liquor, or for what other purpose the place is being operated, if the fact remains, as it does (on the demurrer), that intoxicating liquors are sold on the Sabbath day: *State v. Gelpi*, 48 La. Ann. 520, 19 South. 468; *Mohrman v. State*, 105 Ga. 709, 70 Am. St. Rep. 74, 32 S. E. 143, 43 L. R. A. 398. It is also settled law that it is within

the legitimate exercise of the police ⁶⁴⁹ power for the legislature to enact laws on the subject of abstaining from worldly employments on Sunday, and especially to prohibit the sale of vinous, spirituous or malt liquors on Sunday, and keeping open places where such liquors are sold. Whether the sale is engaged in as a livelihood or profit, or whether sales are made publicly or private, or not at all, is of no consequence, if the places are kept open for such sales: *Frolickstein v. Mayor of Mobile*, 40 Ala. 725; *Dixon v. State*, 76 Ala. 89; *Wadsworth v. Dunnam*, 117 Ala. 661, 23 South. 699; *Manassas Club v. City of Mobile*, 121 Ala. 561, 25 South. 628; *Jebeles v. State*, 131 Ala. 41, 31 South. 377; *Martin v. State*, 59 Ala. 34; *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224; *State v. Common Pleas*, 36 N. J. L. 72, 13 Am. Rep. 422; *State v. Gelpi*, 48 La. Ann. 520, 19 South. 468; *Mohrman v. State*, 105 Ga. 709, 70 Am. St. Rep. 74, 32 S. E. 143, 43 L. R. A. 398; *State v. Ambs*, 20 Mo. 214; *Palmer v. State*, 2 Or. 66. In the light of the past and current events we encounter no difficulty in reaching the conclusion that keeping open a place for the sale of vinous, spirituous, or malt liquors on the Sabbath (or any other day) is hurtful to the comfort and welfare of society, and as a matter of consequence that the legislature in enacting the law in question, was well within the legitimate exercise of the police power, and the fifth ground of the demurrer was properly overruled. We remark that it may be that we should have treated the fifth ground as a "speaking demurrer," as nothing appears on the face of the indictment to show that Beauvoir Club is any more than an ordinary private corporation.

We deem it unnecessary to announce a conclusion in respect to, or even to give consideration to, the suggestion by appellant's counsel that its clubrooms are not within the meaning of the term "barroom": See *Mohrman v. State*, 105 Ga. 709, 70 Am. St. Rep. 74, 32 S. E. 143, 43 L. R. A. 398; also Jackson's evidence in the instance case. The first and second grounds of the demurrer to the indictment are so manifestly without merit as to require no further consideration.

The defendant sought to defend against the indictment under the third section of an act of the legislature approved February 17, 1897, entitled "An act to confirm the incorporation of the Beauvoir Club of Montgomery, ⁶⁵⁰ Alabama, and to enlarge the powers and capacities of said club": Acts

1896-97, p. 1160. The club was incorporated under the general statutes of the state, and by the third section of the confirmatory act, above referred to, amongst the additional powers conferred is the following: "To provide for and dispose of, to its members, cigars, cigarettes, tobacco, spirituous, vinous and malt liquors and such disposition shall not constitute a sale thereof, but shall be held and treated as a consumption by such members of their property." The act is assailed by the state on constitutional grounds. The trial court held that it is obnoxious to the constitution. Several grounds of objection to the act are specifically pointed out by the demurrer to the plea setting up the act as a defense, but the first ground of the demurrer is in this language: "That the provisions of the charter of the defendant are unconstitutional and void." Though seemingly a general statement, this has been held by this court a permissible way of presenting the constitutionality of a statute, and, if it be found that the statute clearly contravenes any provision of the organic law, under such an objection the ruling of the trial court should be sustained: *Montgomery v. Birdsong*, 126 Ala. 632, 28 South. 522; *Bay Shell Road Co. v. O'Donnell*, 87 Ala. 376, 6 South. 119.

It is quite apparent that the provision in section 3 of the confirmatory act, to the effect that the disposal of vinous, spirituous and malt liquors by the club to its members shall not constitute a sale, was injected into the act to avoid the effect of the decision made by this court in 1877 in the case of *Martin v. State*, 59 Ala. 34, wherein the court, speaking through Stone, J., held that furnishing said liquors to its members by a social club (corporation) for a price paid by the member constituted a sale of such liquors. This decision has never been overruled, and remains the general law of the state applicable to such disposal of liquors by clubs. There is no general statute declaring that such disposal of liquors by social clubs shall not constitute a sale, and a social club organized to-day under the incorporation laws of the state would not be exempt from the law as declared in *Martin's* case (59 Ala. 34), nor is any other club that ⁶⁵¹ has been heretofore organized without such special provision exempt from it. In the *Martin* case (59 Ala. 34) it appeared that Martin, in disposing of the liquor, was acting as agent of the Standard Club, a club incorporated in the city of Montgomery for literary and social purposes, so that if the

provision in the defendant's charter is valid, we have two clubs organized for the same purposes, of like kind, and in the same city; but the one operating under a charter obtained under the general laws, if it disposes of liquors belonging to the club for a price paid, makes a sale, while the other, though doing identically what its neighbor in the same locality does, only puts it in the power of the member of the club to "consume his own property," and is not amenable to the laws as declared in Martin's case (59 Ala. 34). The first one, under the law under which the defendant is indicted, would be guilty of a criminal offense, while the other would not, though the acts committed are identical. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow": Locke on Civil Government, sec. 142. "This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments": Cooley's Constitutional Limitations, 2d ed., 391.

Section 23 of article 4 of the constitution of 1875 provided that the operation of no general law shall be suspended by the General Assembly for the benefit of any individual, corporation or association. It may be that, even under that section, it was within legislative competency to prescribe that the disposal of vinous, spirituous or malt liquors by incorporated social clubs to their members for a price paid should not constitute a sale (a question we do not decide). To be valid, however, such a law should be general in its operation, at least to the class or locality to which it applies; for "an act which should select a person or corporation and grant unto him or it immunity from the provisions or operation of a general law, or subject him or it to peculiar rules, or impose special obligations or burdens from which others in the locality or class are exempt, would be unconstitutional. The legislature may suspend the ⁶⁵² operation of the general laws of the state; but, when it does so, the suspension must be general, and cannot be made for individual cases": Cooley's Constitutional Limitations, 2d ed., *390. Special privileges are always obnoxious, and as a rule of construction are always to be leaned against as probably not contemplated or designed. It is obvious that a special privilege is conferred on the defendant by its charter. No club in the same category with defendant, with respect to the pur-

pose of its organization, can dispose of liquors without being amenable to the law as declared in Martin's case (59 Ala. 34); in other words, the exemption from the rule of law declared in that case is peculiar to the defendant. There may be other clubs that have special charters granted by the legislature with a like provision, but they are in the same category with the defendant as to the special privilege and the suspension of the general law. Of such charters we have no judicial knowledge, and, if there are such, that fact would not change the rules of construction adverted to. It is our opinion that that part of the defendant's charter respecting the disposition of liquor to its members not constituting a sale is clearly obnoxious to the twenty-third section of article 4 of the constitution of 1875, and the court properly sustained the demurrer to the plea setting it up as a defense.

It is unnecessary to discuss other points made by the demurrer as to the constitutionality of the act. There are other special pleas to which demurrer was sustained, but neither of them presents any matter in defense which, if good, might not have been proved under the plea of not guilty, which was interposed, and on which the case was tried. Indeed, the matter set up in the second plea, which we have discussed at length, might have been brought forward under the plea of the general issue, and its sufficiency tested by objection to the evidence; but we have treated the demurrer to that plea because it presented the same question that would have been presented by objections to the act, and as a matter of convenience. We give no further consideration to the special pleas.

The next question presented by the record relates to the action of the court in requiring the state's witness ⁶⁵³ Jackson to testify in regard to sales of liquor by others than himself, notwithstanding the witness claimed the privilege not to testify. If it be conceded that the matters about which the witness claimed the privilege not to testify were incriminating, yet we think the ruling of the court cannot be presented here for review by the defendant. It is undoubtedly the law that a witness cannot be compelled to answer any question the answer to which would tend to incriminate him, or would constitute a necessary link in the chain of testimony sufficient to convict him of a criminal offense: *Ex parte Boscowitz*, 84 Ala. 463, 5 Am. St. Rep. 384, 4 South. 279; *Alston v. State*, 109 Ala. 51, 20 South. 81. But the privilege

is personal to the witness, and cannot be claimed for him by a party to the suit (Elliott on Evidence, sec. 1007; 30 Am. & Eng. Ency. of Law, 1165); and when it is claimed by the witness, and the court rules the witness must answer, and he does answer without further protest from him, notwithstanding the defendant objects and excepts to the court's ruling, the evidence is not illegal as to the defendant, and he cannot review the action of the court here. The witness might have persisted in his refusal to answer, and, if held in contempt, he (the witness) might present the action of the court for review by certiorari, as was done in the Boscowitz case (84 Ala. 463, 5 Am. St. Rep. 384, 4 South. 279).

On the undisputed evidence in the case, it results, from what we have said and the conclusions reached and announced in reference to the law of the case, that the defendant was guilty as charged. Consequently, the court properly gave the general affirmative charge with hypothesis for the state, and committed no error in refusing the affirmative charge requested by the defendant.

Affirmed.

Tyson, C. J., and Haralson and Simpson, JJ., concur.

The Sufficiency of the Title to Statutes within constitutional requirements is discussed in the notes to Lewis v. Dunne, 86 Am. St. Rep. 267; Crookson v. County Commissioners, 79 Am. St. Rep. 267; Bobel v. People, 64 Am. St. Rep. 70.

The Power of the Legislature to Regulate or Prohibit the Sale of Intoxicating Liquors is practically unlimited. No person has any vested right to retail such liquors: New Orleans v. Smythe, 116 La. 685, 114 Am. St. Rep. 566; Hart v. State, 87 Miss. 171, 112 Am. St. Rep. 437; Equitable Loan etc. Co. v. Edwardsville, 143 Ala. 182, 111 Am. St. Rep. 34.

An Incorporated Social Club is a Dramshop, under the statutes of Illinois, if it furnishes its members liquors: South Shore Country Club v. People, 228 Ill. 75, 119 Am. St. Rep. 417. See, too, Mohrman v. State, 105 Ga. 709, 70 Am. St. Rep. 74.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

ROBINSON v. KERRIGAN.

[151 Cal. 40, 90 Pac. 129.]

CONSTITUTIONAL LAW—Torrens Land Act.—The fact that persons not named in a complaint or summons may be bound by a decree entered under the Torrens land act, and thereby precluded from asserting their title or interest in the land, though they did not receive any notice except that afforded by the four weeks' publication prescribed by the act, and had no actual notice of the proceedings, does not render the statute unconstitutional. (p. 94.)

CONSTITUTIONAL LAW—Proceedings for Establishing Title to Lands.—The state has full control over the subject and mode of establishing title to property within its limits, and for this purpose may provide a special proceeding in the nature of a proceeding in rem to fix the status of the land, and declare the nature of the titles and interests therein and the person or persons in whom such interests are at the time vested. (pp. 94, 95.)

CONSTITUTIONAL LAW—Judicial Proceedings—Necessity for Adversary Interests.—A proceeding is not necessarily nonjudicial because it is not adversary, nor because there is not an appearance or active opposition by some defendant. (p. 95.)

CONSTITUTIONAL LAW.—Judicial Power is not Restricted to determining controversies actually existing, but may be extended to controversies anticipated, so as to include the function of providing security against disputes and claims which may arise and protecting property and rights from possible, though at the time unknown, hostile claims and pretensions, and of declaring a status or right, and thereby forestalling and preventing controversies. (p. 95.)

CONSTITUTIONAL LAW.—The Torrens Land Act is not Unconstitutional for devolving on the judiciary nonjudicial or merely ministerial functions. (p. 96.)

CONSTITUTIONAL LAW—What is not a Judicial Function.—The fact that by the Torrens land act the registrar is required to note upon the duplicate certificates of title in his office the existence and general character of an instrument creating a lien, encumbrance, trust, power, or lease affecting the land described in the certificate does not show that he was invested with any judicial function, which can be given only to a judicial officer. (p. 97.)

CONSTITUTIONAL LAW.—The Torrens Land Act is not Forbidden Legislation, because it makes special provisions regarding the

statute of limitations, the rights of purchasers in good faith of lands registered under it, and other matters peculiar to lands which are brought within its provisions. (p. 98.)

CONSTITUTIONAL LAW—Statutes, When Embrace but One Subject.—A statute entitled “An act for the certification of land titles and the simplification of the transfer of real estate” may include provisions for the punishment of the fraudulent procuring of false certificates and of obtaining any false entry thereunder, making the county recorder the registrar and requiring him to perform certain duties as such, fixing his official bond so as to cover such duties, prohibiting him from practicing law, giving the petition to establish the title the effect of *lis pendens*, making the decree final and conclusive, providing that liens are not to become effective on the registered title until their entry on the duplicate in the recorder’s office, excluding from claims to registration those founded in adverse possession, and requiring constructive notice to persons unknown of four weeks, for all those provisions are germane to the general subject expressed in the title, and, taken together, compose a part of a general scheme, and are appropriate to effect the main object of the law. (p. 99.)

CONSTITUTIONAL LAW—Torrens Land Act.—The statute establishing the Torrens land system is not subject to any of the objections urged against its validity, and is constitutional. (p. 100.)

Walter H. Robinson and Robert T. Devlin, for the petitioner.

Lent & Humphrey and Page, McCutchen & Knight, amici curiae, for the respondent.

⁴² SHAW, J. This is an original proceeding in this court for a writ of mandate.

The plaintiff asks a writ to compel the defendant, as judge of the superior court, to make an order appointing a time for the hearing of a petition filed in the superior court to obtain registration of certain lands, as provided in the act of March 17, 1897, entitled “An act for the certification of land titles and the simplification of the transfer of real estate,” known as the “Torrens Law”: Stats. 1897, p. 138. The defendant refused to make the order, basing his refusal upon the ground that the act above mentioned is unconstitutional ⁴³ and void. The validity of the act is the sole question presented for our consideration.

The object of the act is well stated in the title. It purports to establish a system for the registration of title to land, whereby the official certificate will always show the state of the title and the person in whom it is vested, and to provide that, after the original registration, transfers of the land may be made in the manner prescribed in detail in the act. As a foundation for the system, it is necessary to have the title established. To that end a proceeding is

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

ROBINSON v. KERRIGAN.

[151 Cal. 40, 90 Pac. 129.]

CONSTITUTIONAL LAW—Torrens Land Act.—The fact that persons not named in a complaint or summons may be bound by a decree entered under the Torrens land act, and thereby precluded from asserting their title or interest in the land, though they did not receive any notice except that afforded by the four weeks' publication prescribed by the act, and had no actual notice of the proceedings, does not render the statute unconstitutional. (p. 94.)

CONSTITUTIONAL LAW—Proceedings for Establishing Title to Lands.—The state has full control over the subject and mode of establishing title to property within its limits, and for this purpose may provide a special proceeding in the nature of a proceeding in rem to fix the status of the land, and declare the nature of the titles and interests therein and the person or persons in whom such interests are at the time vested. (pp. 94, 95.)

CONSTITUTIONAL LAW—Judicial Proceedings—Necessity for Adversary Interests.—A proceeding is not necessarily nonjudicial because it is not adversary, nor because there is not an appearance or active opposition by some defendant. (p. 95.)

CONSTITUTIONAL LAW.—Judicial Power is not Restricted to determining controversies actually existing, but may be extended to controversies anticipated, so as to include the function of providing security against disputes and claims which may arise and protecting property and rights from possible, though at the time unknown, hostile claims and pretensions, and of declaring a status or right, and thereby forestalling and preventing controversies. (p. 95.)

CONSTITUTIONAL LAW.—The Torrens Land Act is not Unconstitutional for devolving on the judiciary nonjudicial or merely ministerial functions. (p. 96.)

CONSTITUTIONAL LAW—What is not a Judicial Function.—The fact that by the Torrens land act the registrar is required to note upon the duplicate certificates of title in his office the existence and general character of an instrument creating a lien, encumbrance, trust, power, or lease affecting the land described in the certificate does not show that he was invested with any judicial function, which can be given only to a judicial officer. (p. 97.)

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authorized whereby such title may be settled and declared by a decree of the superior court. The title thus established is to be certified by the county recorder, and the certificate is made conclusive evidence of title in the person therein named as the owner. The principal point urged in opposition to the issuance of the writ is that the proceeding thus provided for is unconstitutional, because—1. It would deprive persons of property without due process of law; 2. It would deprive persons of the equal protection of the laws; and 3. It commits to the judicial department of the state functions which are not judicial in character, but purely administrative and executive, contrary to section 1 of article 3 of the state constitution, prohibiting one department of state from exercising functions belonging to another.

It is necessary to give a brief statement of the essential features of the proceeding to establish and register titles. Any person owning land which he desires to bring within the operation of the act must avail himself of this proceeding. He is required to file in the superior court a verified petition, setting forth his name, occupation, residence and postoffice address; whether married or single, and if married, the name and residence of the husband or wife; the description of the land, and a statement of his estate or interest in it; that the land is occupied or unoccupied, as the case may be, and, if occupied, the name and postoffice address of each occupant and the interest or estate such occupant has or claims in the land; the liens and encumbrances thereon and easements therein, with the name and address of the holder thereof, if known; whether or not any other person has or claims any estate or interest of any character in the land, and the name and address, if known, of every ⁴⁴ such person and the nature of the estate or interest owned or claimed by him; and the names and addresses of all the owners of adjoining lands, so far as the same can be ascertained. The petition must be accompanied by a plat of a survey of the land, made by a county surveyor, or a licensed surveyor, with a verified or certified abstract of title, made by some person or corporation thereunto authorized as specially provided in the act: Sec. 6. The court must examine and determine, from the abstract of title, whether or not it shows the title to be in the petitioner as alleged, and, if it so determine, it shall thereupon appoint a day for the hearing of the petition: Sec. 12. Notice of the time and

place of the hearing must be given by four weeks' publication in some designated newspaper of general circulation. Notice thereof must also be served in the manner prescribed for service of summons in a civil action, either personal or by publication, as the facts may require, upon all the parties shown by the petition, or by the abstract of title, to be interested, and also upon the husband or wife of the petitioner and upon the owners of the adjoining lands: Sec. 13. We construe this provision for service of notice to mean that the service to be thus made on these persons must be personal service, except in those cases wherein, under sections 412 and 413 of the Code of Civil Procedure, service may be made by publication, and that service upon such parties by publication must be made upon affidavit and order, as in those sections provided, and for the period and in the manner there required. Upon the hearing, if the court finds in accordance with the petition, it must make and enter a decree that the petitioner is the owner of the land, accurately describing it, attaching thereto a diagram thereof and setting forth the particulars of the liens, encumbrances, and easements, and an appeal may be taken therefrom as in civil actions: Sec. 15. The decree, when it becomes final, is made conclusive of the title and estate therein declared and described, against the rights of all persons, known or unknown, whether named in the proceedings or not: Sec. 17. A certified copy of the decree is to be filed with the county recorder, who is designated as "registrar" for the purposes of the act, and upon it he is to issue a certificate of title to the person named in the ⁴⁵ decree as owner, and enter a duplicate thereof in a book kept in his office for that purpose: Secs. 22, 23. The land thereupon becomes "registered land," and the owner named in the certificate thereupon holds it free from every claim except those noted in the certificate. Subsequent transfers of such "registered land" are to be made and entered in the manner prescribed in the act, and certificates thereof are to be issued by the registrar to the transferee, which shall be conclusive evidence of his title as therein stated. Any person who has been, or would be, defrauded by the decree, and who had no actual notice of the proceeding, may maintain an action to establish his right, against the registered owner, at any time within five years after the first registration.

1. It is conceded, as a matter of course, that there would be no want of due process of law if the proceedings affected only those persons who are named in the petition, and who consequently must be served with notice, either personal or by publication, in the same manner as in the case of a summons in a civil action. The objection in this respect is that the decree, by the terms of the act, will preclude persons who are not named, persons who really own the land or an interest therein, but who, because of the fact that their claims or their existence are unknown to the petitioner, are not named in the petition, and who consequently will not receive any notice except that afforded by the four weeks' publication required by the act, and who may have no actual knowledge of the proceeding or of the decree.

The proceeding is in all important particulars of similar character to that provided by the act of 1906, known as the "McEnerney act": Stats. 1906, p. 78. In that act it was expressly provided that the proceeding to establish title therein authorized should be had against all persons claiming any interest in, or lien on, the land, whether known or unknown, and that, if the required notices were given and served, the decree should be conclusive and binding upon all persons, whether named or not, although, as to those not named and unknown, the act required no notice except by publication. In the case of *Title and Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 119 Am. St. Rep. 199, 88 Pac. 356, 8 L. R. A., N. S., 682, that act was attacked as unconstitutional in the same particulars as ⁴⁶ those here urged against the Torrens law, and it was declared to be valid and constitutional. The reasons for holding that act valid are set forth at length in the elaborate opinion of Justice Sloss, rendered in that case. They are fully applicable to the case now under consideration, and we refer to that opinion for a full answer to the objection that the Torrens law does not provide for due process of law, nor afford to all persons the equal protection of the law.

Similar laws have been enacted in Illinois, Minnesota and Massachusetts. These laws were attacked in the supreme courts of those states, on similar constitutional grounds, and have been declared valid. These decisions fully support the conclusion that the act in question does not deprive persons of property without due process of law, nor withhold from them the equal protection of law: *People v. Simon*, 176 Ill.

165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801; State v. Westfall, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175, 57 L. R. A. 297; Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem, to fix the status of the land and declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. It may do this whenever it may be considered necessary or likely to promote the general welfare: Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. ed. 918; People v. Simon, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. Rep. 585, 40 L. ed. 691.

2. The proposition that the proceeding is judicial, and not administrative, that it is properly a matter for the judicial department, was also fully considered and established in Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199, 88 Pac. 356, 8 L. R. A., N. S., 682, and the reasons there given apply here.

The claim on behalf of the defendant in this particular seems to be based on the theory that there is or may be no adverse party to the proceeding; that it may be had where there is in fact no adverse claim, lien or encumbrance to or upon the land, and hence that it is not adversary in character. ⁴⁷ That it may not become adversary in this sense is of course conceded. It would not necessarily follow that the proceeding was not judicial. It needs no citation of authority to establish the proposition that the power of a court to entertain an action does not depend upon the appearance of the defendant and his active opposition to the claims of the plaintiff.

The contention is further made in this connection that judicial power can be exercised only to settle existing disputes and controversies, and that, if none exist, the act of merely describing and declaring an undisputed title is necessarily administrative and cannot be performed by the judicial department. This argument does not fully meet the case. It may be admitted that the existence of controversies which could not be settled by the interested parties, and

the necessity of some other means of determining such controversies, were the primal causes for the institution of courts with power to adjudge between the parties to the strife, and, consequently, that originally the exercise of judicial power implied the existence of an actual present controversy to be determined. But the refinements of civilized life and the necessity for the orderly regulation, determination and protection of human affairs and rights of property have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the function of providing security against disputes and claims which may arise. Hence, in modern times the power of the courts may be, and often is, exerted to protect property and rights from possible, though at the time unknown, hostile claims and pretensions, or to merely declare a status, or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings. In the case provided for by the McEnerney act, the total destruction of all the public records and muniments of title had endangered all real property, had exposed land titles to any sort of false claims, and had made it impossible for any land owner to prove or exhibit his title in the usual manner, if he wished to dispose of or mortgage his land, or defend his title in court. It therefore became necessary to provide for the establishment of a new record ⁴⁸ title. In the case of the Torrens law the plan for a new method of registering and transferring titles made it necessary that the absolute title should first be established and declared. In each case a status, or right, was to be established, declared and made conclusive, as the foundation for subsequent proceedings and transactions. This was a sufficient cause for placing the property to be thus affected within the jurisdiction of the court as a res, the ultimate right and title to which could be there adjudicated, after reasonable notice to all possible claimants to appear and assert their claims. Whether or not this is strictly an exercise of judicial power, as originally instituted, it cannot be denied that it is a power of the class which, from time immemorial, has been committed to and exercised by the courts. At the time the constitution was adopted this class of powers had long been usually exercised by the courts alone. It must be presumed that in providing therein for the division of governmental power into

three departments, legislative, executive and judicial, and declaring that no person charged with the exercise of the powers belonging to one of them should exercise functions appertaining to either of the others, this usual power of the courts was in mind, and that it was intended that the courts should continue to exercise these quasi-judicial powers, as they had previously been accustomed to do. A law which merely creates a new occasion and provides a new procedure for the exercise of this power cannot be said to transgress this clause of the constitution.

Furthermore, in such matters, there is always a possibility that there may be a hostile claim or dispute as to the right to be established. If it were necessary to find further justification for classing this power as judicial, this circumstance would be sufficient. A hostile claim being possible, there is, in contemplation of law, an adverse claim to be settled, a right to be protected against the possible claimant, for which a judicial decree is the only practicable and effectual remedy.

3. The claim is made, although not argued, that by sections 48, 49, 55, 58, 59, 60, 61, 64, 67 and 68 of the act the registrar is given judicial powers. These sections require the registrar to note upon the duplicate certificate of title ⁴⁹ in his office the existence and general character of instruments creating liens, encumbrances, trusts, powers or leases affecting the land described in the certificate. The point is that the registrar is required to determine the legal effect of these instruments, and that this is a judicial function which can be given only to a judicial officer. There is no force to the objection. Every administrative officer is frequently called upon, in the discharge of his duties, to decide questions of law relating thereto. The recorder is required to determine whether an instrument presented for record is a deed, a mortgage, a lease, a notice of action, or what not, so as to record it in its proper book. The sheriff must often determine, for his own guidance in making a levy, the ownership of property. The clerk must determine the nature and legal effect of papers filed with him, and perform the appropriate duty respecting them. The duties required of the registrar by these sections are of the same nature. His decision in the matter is not conclusive. If he decides wrongfully and refuses to perform the appropriate duty in the premises, he may be compelled to act

properly by means of a writ of mandamus, the same as any other ministerial officer who mistakes his duty under the law and refuses to perform it. The exercise of such powers by ministerial officers is a necessary function of the executive department, and although it may require similar deliberation to that involved in the exercise of judicial power, the bestowal of such powers upon the executive department does not violate the provisions of the constitution forbidding that department to exercise the functions of any other department: *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801; *Land Owners v. People*, 113 Ill. 296; 1 Story on Constitution, 5th ed., sec. 525.

4. It is claimed that the act is special because it makes special provisions regarding the statute of limitations, the rights of purchasers in good faith of land registered under the act, and other matters peculiar to the lands which are brought within its provisions. We perceive no merit in this contention. The fact that the land thus registered may be conveyed and transferred by means different from that required as to other lands, and the necessity of a special proceeding as a foundation for the system, creates a separate⁵⁰ class of such registered lands, and authorizes special provisions of law on the subject, applying only to such registered lands, the owners thereof, or persons interested therein, or to the procedure whereby the system is to be inaugurated.

5. The claim is also made that the act violates the provision of section 24 of article 4 of the constitution, that "Every act shall embrace but one subject, which subject shall be expressed in its title."

The title of the act is "An act for the certification of land titles and the simplification of the transfer of real estate." The act makes it a felony to fraudulently procure a false certificate of title under the act, or to fraudulently obtain any false entry thereunder: Secs. 111, 112. The county recorder is constituted the registrar under the act, and required to perform the duties of registrar: Sec. 1. The official bond of the recorder is made to cover his duties as registrar: Sec. 2. The registrar is prohibited from practicing law: Sec. 4. The filing of the petition to establish title operates as a *lis pendens*: Sec. 11. The decree is made final and conclusive: Sec. 17. Liens are not to become effective on registered land until their entry on the duplicate certifi-

cate in the recorder's office: Secs. 91, 92, 93, 94 and 95. Claims to registered lands cannot be obtained by adverse possession: Sec. 35. Four weeks' constructive notice is all that is required with respect to persons who are unknown: Sec. 12. These provisions relate to the subjects of felonies, county officers, county government, principal and surety, attorneys at law, judgments, liens, procedure and adverse claims, respectively, and it is claimed that the act is void because none of them are mentioned in the title. And it is intimated that if they were mentioned, the law would be contrary to the mandate of the constitution that the act shall embrace but one subject. If the first proposition is well taken, it is certain that the second is also established. But the mere statement of the objection is almost sufficient to refute it. While it is true that none of the subjects thus designated is expressed in the title, they are all germane to the general subject there expressed, and, taken together, they compose a part of the general scheme, and are appropriate to effect the main object of the law. Further examination would have disclosed ⁵¹ a large number of such "subjects" in the body of the act which are not mentioned in the title. The same criticism might be made of many acts on a general subject which have always been considered as valid. The act establishing the scheme is the appropriate place for provisions necessary to make it effective and symmetrical. If it were necessary to mention every subdivision of the general subject of an act in the title to the extent here claimed, our statutes would present a somewhat ludicrous appearance. The statement of the subject in the title would generally occupy almost as much space as the act itself. Furthermore, if subjects, as intended by the constitution, must be so minutely subdivided, it would be impracticable to enact any comprehensive law on any general subject, by reason of the necessity of dividing it into so many separate acts. The provision must receive, and it has received, a more liberal construction. The word "subject" is given a broader meaning: *People v. Mullender*, 132 Cal. 217, 64 Pac. 299. All the provisions objected to as constituting a different subject are reasonably necessary as means for attaining the object of the act indicated by the subject which is expressed, and hence they are considered as included in the title, as subdivisions of the general subject there stated: *People v. Parks*, 58 Cal. 624; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251;

Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28. We think the title to the act sufficiently expresses the subject to which it relates, and that it embraces but one general subject. We find no sufficient ground for holding the law unconstitutional.

Let the writ of mandate issue as prayed for.

Sloss, J., Henshaw, J., Angellotti, J., McFarland, J., and Lorigan, J., concurred.

Rehearing denied.

The Constitutionality of Statutes providing for suits against unknown owners to quiet title to land is discussed in the recent case of Title and Document Restoration Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199, and in the note to McClymond v. Noble, 87 Am. St. Rep. 358. It has been affirmed that a statute which provides that if the owner of land shall fail to pay all arrearages of taxes thereon, the land shall be forfeited to the state without judicial proceedings, has been held unconstitutional as depriving the owner of his property without due process of law: Parish v. East Coast Cedar Co., 133 N. C. 478, 98 Am. St. Rep. 718.

The Constitutionality of the Torrens Land Act has been admitted in State v. Westfall, 85 Minn. 437, 89 Am. St. Rep. 571; People v. Simon, 176 Ill. 165, 68 Am. St. Rep. 175; but denied in State v. Guilbert, 56 Ohio St. 575, 60 Am. St. Rep. 756.

The Sufficiency of the Title of Statutes within the requirements of the constitution is discussed in the notes to Lewis v. Dunne, 86 Am. St. Rep. 267; Crookson v. County Commissioners, 79 Am. St. Rep. 267; Bobel v. People, 64 Am. St. Rep. 70.

ESTATE OF PLUMEL.

[151 Cal. 77, 90 Pac. 192.]

A HOLOGRAPHIC WILL in Which Some of the Figures Composing the Date are printed is not wholly in the handwriting of the testator, and is therefore void. (pp. 101, 102.)

WILLS, Referring to and Incorporating Therein Other Documents.—A will executed in accordance with the requirements of the statute may by appropriate reference incorporate within itself a document or paper not so executed. (p. 102.)

WILLS.—To Incorporate Another Paper in a Will, such paper must be in existence at the execution of the will, and must be referred to therein as an existing paper, so as to be capable of identification. (p. 102.)

CODICIL, When Refers to a Will so as to Cure Defects in the Execution of the Latter.—Where a paper is written on the reverse side of a holographic will, not effectively executed, and is styled “codicil,” this word imports a reference to some prior paper as a will, and if executed with the formalities requisite for a will, makes good an invalidly executed holographic will written on such reverse side. (pp. 103, 104.)

WILL AND CODICIL, Connection of the One with the Other.—Where a paper purporting to be a codicil is executed with the formalities required of a will or imports a reference to some already existing document regarded by the testator as his will, to identify that instrument and to interpret that reference as applying to it, all the surrounding circumstances may be shown. (p. 105.)

P. A. Bergerot and W. I. Brobeck, for the appellants.

Bradley & McKinstry, for the respondent.

⁷⁸ SLOSS, J. J. F. Plumel, a resident of the city and county of San Francisco, died on July 11, 1905, leaving an estate consisting of his separate property. His sole heirs at law were three sisters, the appellants here, and his widow, Annie Plumel, the respondent.

Two instruments, written respectively on the obverse and reverse sides of a single sheet of paper, were offered for probate as the will and codicil of the decedent, and both were admitted to probate. From the order admitting the alleged will to probate, the sisters prosecute this appeal.

The will was dated January 12, 1904. By its terms the residue of the estate, after certain bequests to the sisters and others, was given to the respondent, who is named as executrix. This instrument was not attested. It was entirely written, dated, and signed by the hand of the decedent, with the exception of the figures “190” in the date 1904. The figures “190” were printed.

⁷⁹ Upon the back of the same sheet of paper the codicil was written. It complied with the requirements of the law regarding holographic wills, being entirely written, dated, and signed by the hand of the testator, and read as follows:

“CODICIL.

“Jan. 14, 1904.

“In case of railway or steamship disaster in which both myself and wife should be killed, I will and bequeath all property real or personal to my sisters resident in France, share and share alike.

J. F. PLUMEL.”

The will of January 12, 1904, being unattested and being invalid as a holographic will, because not entirely written,

dated, and signed by the hand of the testator, was not, standing alone, entitled to be admitted to probate: Civ. Code, sec. 1277; Estate of Billings, 64 Cal. 427, 1 Pac. 701. But the contention of the respondent is that the codicil incorporated in itself the terms of the will, and that, on proof of the due execution of the codicil, both documents were properly admitted to probate as the testamentary act of the decedent. This position is not, as the appellants assume, based on section 1287 of the Civil Code, which provides that "the execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil." It is not necessary here to consider whether this section has any application to the facts of this case. Apart from its terms, it has long been settled that a will or codicil executed in accordance with the requirements of statute may, by an appropriate reference, incorporate within itself a document or paper not so executed: 30 Am. & Eng. Ency. of Law, 2d ed., 578; Habergham v. Vincent, 2 Ves. Jr. 204, 228; Smart v. Prujean, 6 Ves. Jr. 560; Allen v. Maddock, 11 Moore P. C. 427; Brown v. Clark, 77 N. Y. 369. In Estate of Willey, 128 Cal. 1, 60 Pac. 471, this court quoted with approval the following language from Redfield on the Law of Wills (volume 1, page *264): "The cases already referred to show very clearly that a will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may, nevertheless, adopt an existing paper by reference. . . . This 'incorporation' of the paper referred to into the will so makes it a part of the instrument ^{so} that no distinct proof of the paper is required, or even filing, in the probate court. The proof of the will sets up and establishes the paper, as a portion of itself, by proof of the reference to the consequent incorporation." And the court went on to say: "The principle is also substantially declared in the case of In re Soher, 78 Cal. 477, 21 Pac. 8. Of course, the reference must be certain, and to an instrument then in existence."

It is no doubt true, as is stated in the Willey case, that in order to make out a case for the application of the doctrine of incorporation by reference, the paper referred to must not only be in existence at the time of the execution of the attested or properly executed paper, but that it must be referred to in the latter as an existent paper, so as to be capable of identification. But we think that in the present case there was a sufficient reference in the codicil to identify the will

upon the obverse of the same sheet of paper as the instrument referred to. The later paper is designated by the testator as a "codicil," a term which in itself implies that it is an addition to or modification of some existing testamentary paper. "A codicil is some addition to or qualification of a last will and testament. A codicil is part of a will to which it is attached or referred, and both must be taken and construed together as one instrument": *Proctor v. Clarke*, 3 Redf. 445. By its very definition, the word "codicil" imports a reference to some prior paper as a will. And the fact that the codicil is written upon a sheet of paper containing a writing which purports to be testamentary in character is sufficient to justify the inference that such writing is the will referred to by the codicil.

In *Jarman on Wills*, page *153, it is said: "It seems to have been considered, in the ecclesiastical courts at least, that the fact of the codicil being written on the same piece of paper as the prior will (though it does not in terms refer to such will), sufficiently indicates an intention to treat that as the subsisting will." In *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581, the court said: "Where the codicil is written on the same piece of paper as the will, or clearly and unmistakably refers to the will, so as to preclude all doubt of its identity, proof of the codicil establishes the will without further proof, except such portions thereof ⁸¹ as are revoked or altered by the codicil." In *Goods of Heathcote*, 6 P. D. 30, an invalid will was offered, together with a codicil upon the same sheet of paper, beginning with the words: "This is a codicil to the last will and testament of me." There was no further or other reference to any will, and there was no later will than the one contained upon the same sheet of paper as the codicil. It was held that there was a sufficient reference to allow the will to be probated. In view of the meaning of the word "codicil," the language of the testatrix in the case just cited has no greater force as a reference to a prior will than has the single word "codicil" in the case at bar. In *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120, where the paper incorporated was particularly described in the codicil, but not attached to it, the court said: "If the codicil had been attached by a wafer I presume there would have been no room for doubt. A list of decisions for more than one hundred and thirty years sustains this point. What is the difference between this wafer annexation of a

codicil, which may not mention the previous will, otherwise than by reciting that 'this is my codicil to my last will,' and the case before us?"

We are referred to no case holding that the fact that a codicil is physically attached to, or is written upon, a paper containing a prior attempted testamentary disposition, is not to be considered as tending to establish that this prior writing is the one referred to in the codicil. It is urged that the reference must be certain so as to enable the identification of the paper sought to be incorporated without the aid of evidence outside of the codicil itself, and that parol evidence is required to show that the will and codicil are written on the same sheet of paper. It is true that there is some language in *Estate of Young*, 123 Cal. 337, 55 Pac. 1011, which, taken literally, tends to sustain the view that the identification of the paper to be incorporated must be possible from the face of the will or codicil alone. In that case the reference in the will was merely to "two deeds," which were not described in any way. Any two deeds, whenever executed, would have satisfied the reference. It was held, and beyond question rightly, that parol evidence was not admissible to show that the testatrix had two particular deeds in mind. But it is to be remembered that no reference, however explicit on its face, can ⁸² identify a separate paper without the production of evidence to show that the particular paper offered does correspond to the descriptive particulars named in the will. We think the correct rule was stated by this court in *Re Shillaber*, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. 453, quoting from *Allen v. Maddock*, 11 Moore P. C. 427: "A reference in a will may be in such terms as to exclude oral testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that, where there is a reference to any written document, described as then existing in such terms as it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question is, whether the evidence is sufficient for the purpose." Similarly, in *Brown v. Clark*, 77 N. Y. 369, the court of appeals of New York said: "It is established by a long line of authorities that any testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct and clearly identifies, or ren-

ders capable of identification, by the aid of extrinsic proof, the document to which reference is made": See, also, *Dickenson v. Stidolph*, 11 Com. B., N. S., 341.

As we have said, the use of the word "codicil" imports a reference to some already existing document, regarded by the testator as his will. To identify that instrument, and to interpret the reference as applying to it, the surrounding circumstances may be shown. We think there is nothing in the decision in *Estate of Young*, 123 Cal. 337, 55 Pac. 1011, which conflicts with the conclusion drawn from the authorities above cited; i. e., that the facts—1. That the codicil is written upon the same piece of paper as a writing purporting to be a will; and 2. That no other will is produced—may be considered as tending to identify the purported will as the one referred to.

The order appealed from is affirmed.

Shaw, J., and Angellotti, J., concurred.

Holographic Wills are discussed in the note to *Estate of Fay*, 104 Am. St. Rep. 22. That a holograph may be in the form of a letter, see *Buffington v. Thomas*, 84 Miss. 157, 105 Am. St. Rep. 423. As to what is meant by a will among the "valuable papers" of the decedent, see *Brogan v. Barnard*, 115 Tenn. 260, 112 Am. St. Rep. 822.

The Incorporation in a Will of Extrinsic Papers by reference is the subject of a note to *Bryan v. Bigelow*, 107 Am. St. Rep. 70.

ESTATE OF DAVIS.

[151 Cal. 318, 86 Pac. 183, 90 Pac. 711.]

PROBATE OF WILL, Attack upon, When Collateral.—When, in response to a petition for distribution, persons appear claiming to be heirs of the decedent and seek to attack the probate of the will on the ground that it is a forgery and that its probate was procured by perjured testimony, praying to have such probate set aside, though the time to appeal therefrom has long passed, this is a collateral and not a direct attack. (p. 110.)

JUDGMENTS, Collateral Attack upon.—In a collateral attack upon a judgment of a court of general jurisdiction, it can be impeached only for want of jurisdiction appearing on the face of the judgment-roll. (p. 110.)

PROBATE OF WILL—Failure to Enter Continuance.—If notice is given of the time and place of hearing of an application for the probate of a will, the failure to adjourn the hearing from the time fixed to a later day, on which the matter was in fact taken up and

disposed of, is at most an irregularity occurring after jurisdiction has been acquired. (p. 111.)

THE PROBATE OF A WILL cannot be Collaterally Attacked on the ground that after due notice was given of the time and place when the application for probate would be heard, it was not then heard, but was taken up and disposed of at a subsequent time without giving a new notice and without having adjourned the hearing to such subsequent date. (p. 111.)

THE JURISDICTION of the Probate Court When Dealing with Probate Matters is that of a court of general jurisdiction, and the same presumptions attach to its acts as in any other proceeding of which it has jurisdiction. (p. 112.)

PROBATE OF WILL—Adjournment of the Hearing of an Application for, When must be Presumed.—If it appears that due notice was given of the time and place for hearing an application for the probate of a will, and, at a time long subsequent to that so fixed, the court entered an order reciting that the petition came on regularly for hearing, and that it had been proved that notice had been given as prescribed by law, and admitting the will to probate, it must be presumed that orders were made for due adjournment of the hearing to the time when it took place. (p. 112.)

PROBATE OF A WILL—Statute Respecting, When not Unconstitutional as to Nonresidents.—A statute fixing the time for giving notice of application for the probate of a will will not be declared unconstitutional in its operation against a nonresident on the ground that by existing means of communication between the place of his residence and the place where the notice is given and the application is to be heard, he could not have seen the published notice in time to enable him to appear and oppose the probate on the day set for the hearing, when by the statute he is further given one year from the probate within which to contest the will. (p. 113.)

THE PROBATE OF A WILL cannot be Set Aside for Fraud in the Procuring of the Jury where the attack is being made collaterally in opposition to an application for distribution. (p. 113.)

PROBATE OF WILL, Effect of on Application for Distribution. To an application for the distribution of the estate of a decedent the probate of a will is conclusive on all the parties, and persons who, according to the will, have no interest in the estate, are not entitled to be heard, and their pleadings may be stricken out. (p. 114.)

CONSTITUTIONAL LAW, What is not a Denial of the Right to a Hearing.—The striking out of the pleadings of parties who appear in opposition to an application for the distribution of the estate of a decedent on the ground that it appears by the records of the court that the will of the testator has been admitted to probate, and therefore it is clear that such parties have no interest, is not a denial of the right of such parties to a hearing. (p. 114.)

APPEAL—Effect of the Destruction of the Record During the Pendency of.—The fact that the decision and judgment of the appellate court were made after the transcript on appeal had been destroyed by fire and without any restoration of it does not make such judgment or decision or the remittitur issued thereon void. (p. 115.)

THE JURISDICTION of the Appellate Court is Acquired by the filing of a notice of appeal in the trial court, and is not destroyed or suspended by the loss or destruction of the transcript on appeal after it is filed. (p. 116.)

William T. Baggett, F. H. Gould, Horace W. Philbrook and W. J. Bartnett, for the appellants.

Campbell, Metson & Campbell and Thomas H. Breeze, for the respondents.

³²⁰ SLOSS, J. Appeal from decree of settlement of final account and final distribution.

Jacob Z. Davis died on October 28, 1896. On November 16, 1896, Lizzie Muir and Belle Curtis presented to the superior court of the city and county of San Francisco a paper purporting to be the holographic will of said Davis and filed a petition praying for its admission to probate. The document bore date October 1, 1896, and by its terms purported to give and bequeath all of Davis' property to the petitioners, Lizzie Muir and Belle Curtis. On the filing of the petition, the clerk fixed Monday, the thirtieth day of November, 1896, and the courtroom of said superior court as the time and place for proving the will, and for hearing the application for letters. The notice was duly published as required by section 1303 of the Code of Civil Procedure. On November 30, 1896, Joseph P. Wilson and Catherine Stead, claiming to be heirs of said decedent, appeared and filed an opposition to the probate of the alleged will on various grounds. On May 15, 1897, Elizabeth Wilson, also claiming to be an heir, filed her opposition to the probate. The petitioners filed answers to both oppositions. While other grounds of opposition were pleaded, the real point raised by those opposing the probate was that the alleged will was a forgery. A trial was had before a jury, which on August 16, 1897, returned a verdict in favor of the genuineness of the document, and thereupon an order was made by the court admitting the said paper to probate, and directing the issuance to Lizzie Muir and Belle Curtis of letters of administration with the will annexed. On April 8, 1898, the superior court made ³²¹ a decree of partial distribution, distributing to Lizzie Muir and Belle Curtis the sum of fifteen thousand dollars. On June 23, 1898, the order admitting the will to probate and the decree of partial distribution, appeals from which had been taken, were by this court affirmed. On the same day a petition to revoke the probate, filed by Catherine Stead, Joseph P. Wilson, Elizabeth V. Wilson and her four children, was dismissed and denied. The affirmances of the order and decree appealed from and the dismissal of the contest were made

by the consent of all parties who had then appeared, a compromise having been effected as between them.

On September 7, 1900, Laura E. Tracy, claiming to be a niece of the decedent, filed a contest and petition for revocation of the probate of the will. She had not been a party to the oppositions and contests above mentioned, and had in no way theretofore appeared in the proceedings relating to the probate of the administration of the estate. Her petition alleged, in substance, that at the time of Davis' death, October 28, 1896, she (the petitioner) was living in the republic of Hawaii, then a foreign country, and had no knowledge of the fact that her uncle had been residing in San Francisco, or of his death, or of the probate proceedings, until after September 15, 1899; that soon thereafter she discovered these facts, and further, that the document admitted to probate was not the will of Davis, but was a forgery, executed by some person or persons pursuant to a conspiracy entered into between Lizzie Muir, Belle Curtis, and others for the purpose of gaining possession of Davis' estate. She further alleged that in execution of this conspiracy the paper was offered for probate, and that upon the trial of the oppositions filed by Joseph P. and Elizabeth Wilson and Catherine Stead the conspirators fraudulently procured names of three persons not regularly drawn to be included in the panel of jurors selected for the trial of the oppositions; that these three persons, so chosen by themselves, were accepted and served as members of the jury, and that by their efforts and in consequence of perjured testimony offered on behalf of the proponents, a verdict was returned by nine of the jurors, including the three fraudulently serving, finding the paper to have been entirely written, signed, and dated by the hand of Jacob Z. Davis. Upon demurrer by the administratrices ³²² and beneficiaries, the petition was dismissed. Laura E. Tracy, the petitioner, appealed from the order dismissing her contest, and on June 20, 1902, this court affirmed the order appealed from: *Estate of Davis*, 136 Cal. 590, 69 Pac. 412.

On April 20, 1904, the administratrices filed their final account, accompanied by a petition for distribution. Upon the hearing of the petition Laura E. Tracy and the parties to the contest of June 22, 1898 (comprising all the parties who had originally opposed the probate of the will or contested it after probate), appeared and filed an answer to the petition and a petition for distribution to themselves. In their pleading, in

addition to allegations showing them to be heirs of the decedent, they repeated substantially the allegations of the petition of Laura E. Tracy for revocation of probate. The administratrices moved that the answer and petition be stricken from the files of the court upon the ground that a will had been admitted to probate under which they were sole legatees and devisees. The court, taking judicial notice of and considering the prior proceedings in the estate, as above enumerated, granted the motion, and, declining to permit the said alleged heirs to be heard or to participate in the proceedings, made its decree settling the final account and distributing the residue of the estate remaining in the hands of the administratrices to Lizzie Muir and Belle Curtis. It is from this decree that the present appeal is taken.

It is plain that if the probate of the alleged will of Jacob Z. Davis was regular, and if such probate was conclusive upon the appellants, the respondents are the only parties entitled to share in the distribution of the estate, and the appellants have no interest in such estate. The position of the appellants is therefore that the attempted admission to probate of the paper (which, as they allege, was a forgery) was fraudulent; that, apart from any fraud, the order admitting the will to probate was without jurisdiction and void for want of notice to the appellant Tracy; and that they are entitled to raise these objections on this proceeding for distribution.

It may be well at this point to consider the nature of the attack so made on the probate of the will. Is it direct or collateral? The proceeding for probate had terminated some ~~323~~ six years before, in an order admitting the alleged will to probate. The attack now under discussion was made in response to a petition for distribution, a proceeding not having for its purpose the probate of the will, but entirely distinct in its scope. It is true that both proceedings, the petition for probate and the petition for distribution, related to the same estate. But the procedure of this state contemplates in the administration of the estates of deceased persons a series of different proceedings, each of which is, as to the matters embraced within its purview, separate. And an adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate. Thus, an order appointing an administrator may be appealed from (Code Civ. Proc.,

sec. 963), or may be revoked on petition in certain instances (Code Civ. Proc., sec. 1383). But it cannot be said that an attack on an order appointing an administrator should, after the lapse of the time for appeal, be termed direct merely because made in some proceeding connected with the administration of the same estate—for example, on the settlement of an account, or an application for confirmation of a sale of real estate. So, with other proceedings in the course of the administration of the estate, where the order or judgment made is appealable, such as orders admitting wills to probate, orders settling accounts of administrators or executors, or the like. Each can be attacked directly by appeal, or by some motion authorized by law for the purpose, or, perhaps, by bill in equity, but an attack made in a different proceeding in the same estate would clearly be collateral. Thus, in *Estate of Devincenzi*, 119 Cal. 498, 51 Pac. 845, it was held that an objection to a confirmation of sale of real estate, on the ground that the administrator's petition for the order of sale was defective, was a collateral attack upon the order of sale. In principle, the present case does not differ from the one cited. While the opposition of appellants contained a prayer that the order admitting the will to probate be annulled and set aside, this was a mere incident of the relief sought in the proceeding for distribution, and the attack on the probate cannot be regarded as direct. The cases cited by appellants in which this court held that a motion to set aside a judgment as void was a ³²⁴ direct and not a collateral attack (*People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *People v. Pearson*, 76 Cal. 400, 18 Pac. 424; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089), were all cases where the motion was made in the case in which the judgment had been rendered by a party appearing for that purpose, not, as here, where the setting aside of the judgment complained of was merely a part of the relief sought in a different proceeding.

In the case at bar the distinction between direct and collateral attack is important in view of the settled rule that in a collateral attack upon a judgment of a court of general jurisdiction the judgment can be impeached only for a want of jurisdiction appearing upon the face of the judgment-roll; or, as sometimes stated, on collateral attack only a judgment which is void on its face may be set aside: *People v. Thomas*, 101 Cal. 571, 36 Pac. 9; *In re Eichhoff*, 101 Cal. 600, 36 Pac. 11.

This brings us to a consideration of the objections urged against the order in question.

1. It is claimed that the order admitting the will to probate was void as to the appellant Tracy, who had not appeared, for the reason that the hearing was not had on the day specified in the original notice, and the record does not show any order or orders continuing the hearing to the time, some eight months later, when the alleged will actually came up for proof. Section 1306 of the Code of Civil Procedure provides for the hearing of testimony in proof of the will "at the time appointed for the hearing, or the time to which the hearing may have been postponed." It is argued that if the proof be not heard at the time specified in the notice, and no order is made continuing the hearing to some other time, a discontinuance results, and a new notice must be given in order to vest the court with jurisdiction to entertain the petition. This court has held in *Estate of Warfield*, 22 Cal. 51, 83 Am. Dec. 49, that where a notice of time and place of probating a will was given, the failure to adjourn the hearing from the time fixed in the notice to a later day when the matter was in fact taken up, was, "at most, an irregularity, occurring after jurisdiction had been acquired." We see no reason for departing from the rule ³²⁵ declared, but even if the defect complained of were to be regarded as jurisdictional, we could on this collateral attack look only to the record, which does not show affirmatively that the hearing was not regularly continued. The superior court, when dealing with probate matters, is to be considered a court of general jurisdiction, and the same presumptions attach to its acts as in any other action or proceeding over which it has no jurisdiction: *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 548. The record here shows that a petition for probate of will was filed, that the clerk's notice fixing November 30, 1896, as the time for proving the will was published as required by law, that on August 17, 1897, the court made an order which, after reciting that the petition came on regularly for hearing and that it had been proved that notice had been given as required by law, admitted the will to probate. It does not appear affirmatively, apart from these recitals, that the hearing was continued from March 30, 1896, by the court; neither does it appear that it was not. The presumption is that everything was done that was necessary to sustain the action of the court. "The rule in this respect is, that where the record recites

that which was done nothing to the contrary may be presumed; but where the record is silent the presumption is that that was done which was requisite to sustain the jurisdiction": *Estate of Twombly*, 120 Cal. 350, 52 Pac. 815. We find no provision in our statutes indicating that any orders continuing the hearing form a necessary part of the judgment-roll or "technical record." But even if they do, their absence would not invalidate the order admitting the will to probate. At most, the record is silent on the question of whether such orders were made, and in the case of a court of general jurisdiction, when a judgment "comes in question collaterally, service will be presumed when the record is silent": *Van Fleet on Collateral Attack*, sec. 830. If, as contended by appellants, such orders form a part of the notice to which parties interested are entitled, the recitals in the order admitting the will to probate, that the petition came on regularly for hearing, and that notice had been given "as required by law," are sufficient to justify the presumption that such orders were made, where the contrary does not affirmatively appear from the record: ³²⁶ *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138.

This case does not come within the rule that where a service appearing in the record is insufficient it will not be presumed that any different and other service was made. This rule "has no application where the record does not purport to show all that was done, and the judgment states that all that was necessary to be done was done": *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138.

2. It is urged that inasmuch as Laura E. Tracy was at the time of Davis' death domiciled in the republic of Hawaii, and as the then existing means of communication between said republic and this state rendered it impossible for her to have seen the published notice in time to enable her to appear and oppose the probate on the day set for the hearing, there was in fact no notice to her, and the statute fixing the time for publication (*Code Civ. Proc.*, sec. 1303) is, as to nonresident heirs so situated, unconstitutional in that it deprives them of their property without due process of law. The same proposition was urged by the appellant Tracy on her appeal from the order dismissing her petition to revoke the probate of the will. In affirming the order this court said (136 Cal. 596, 69 Pac. 414): "It is next asserted that the statute providing for constructive notice is unconstitutional in this, that the ten

days herein provided is too short to serve as constructive notice to the world, and that the period of time being so short, therefore the statute is unreasonable and consequently void. As before suggested, the proceeding as to the probate of a will is essentially one in rem, and in the very nature of things the state is allowed a wide latitude in determining the character of the constructive notice to be given to the world in a proceeding where it has absolute possession of the res. It would be an exceptional case where a court would declare a statute void, as depriving a party of his property without due process of law, the proceeding being strictly in rem, and the res within the state, upon the ground that the constructive notice prescribed by the statute was unreasonably short. It would seem that very few cases of that kind could be found in the books. Certainly this is not one of them. Public policy demands that a will shall have a speedy probate, and the legislature, ³²⁷ recognizing that fact, has given the heir, by express enactment, one year after probate has been decreed within which time he may attack the will. His rights are in no way concluded by the decree of probate. He has an entire year thereafter in which to attack the will, and he may attack it upon the same grounds and for the same reasons that he could attack it prior to its probate. Even the measure of evidence demanded of him for a successful attack is no different in the two cases. It is thus apparent that in such a case as the one presented here, due process of law was in no degree denied Laura Tracy upon the hearing." We have no disposition to depart from the rule there laid down. The point was elaborately argued and carefully considered. Whether or not this be a proper case for applying the doctrine of "res adjudicata" or that of the "law of the case," we are satisfied with the conclusion reached, and adhere to it.

3. The contention that the order should be set aside for fraud in the procuring of a jury may be answered briefly in view of our determination that the attack is collateral. It is well settled, as hereinbefore stated, that upon such attack only the jurisdiction of the court can be inquired into, and, as to jurisdiction, only such defects as appear on the face of the judgment-roll. Of course, the alleged fraud does not so appear. Whether the appellants could avail themselves of this ground of attack in a suit in equity to set aside the probate is another question (see *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Langdon v. Blackburn*, 109 Cal. 19,

41 Pac. 814), which need not be decided here, since this does not purport to be such a proceeding.

It follows that the trial court rightly held that on this petition for distribution the probate of the will was conclusive on all parties. Necessarily, then, the persons claiming to be heirs had no interest in the proceeding, since they were not beneficiaries under the will. It is claimed that they were deprived of a hearing by the striking out of their pleading. But they were heard on the question of whether or not their pleading should be stricken out, and this involved the essential point in controversy—i. e., whether, assuming the truth of all facts alleged by them, they were in a position to attack the probate of the will. If they were not in such position, they had no standing to oppose the distribution ³²⁸ sought, and were not injured by the striking out of their opposition and petition for distribution to themselves. The effect of the order was the same as that of an order sustaining a demurrer, without leave to amend. We do not think the case comes within the principle of *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914, and *McVeigh v. United States*, 11 Wall. 259, 20 L. ed. 80, cited by appellants. There a defendant's answer had been stricken out and his default entered for some reason collateral to the merits of the action. Here the pleading is stricken out because on the face of the record it appears that the appellants are not parties entitled to resist respondents' petition, and are not, on their own showing, entitled to have any affirmative relief on their own petition. It cannot be said that the appellants were in any substantial sense denied a hearing, when they were fully heard on the only question involved—viz., their interest in the estate. The language of the court in *Grigg v. Dalsheimer*, 88 Va. 508, 13 S. E. 993, is applicable, viz.: "They, however, had their day in court, and they were not arbitrarily put out of court, and denied an opportunity to make defense, as was the defendant in the celebrated *McVeigh* case."

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

Subsequent to the issuance of the remittitur in pursuance of the foregoing judgment, the appellants made a motion to vacate the decision and judgment and to recall the remittitur, on which the following opinion was rendered on the twenty-first day of May, 1907:

LORIGAN, J. This is a motion to vacate the decision and judgment of this court rendered on appeal in the above cause, and to recall the remittitur.

It appears from the showing made in support of the motion that a duly certified and printed transcript of the record on appeal in the cause was filed in this court on June 1, 1905; that thereafter briefs were filed, and on February 27, 1906, the cause, being regularly set down on the calendar for hearing on that day, was argued orally by the attorneys for the respective parties and submitted in ³²⁹ department one of this court for decision; that during the earthquake and consequent conflagration in the city of San Francisco in April, 1906, the office of the clerk of this court, with its contents, including the certified transcript on appeal in this case, was destroyed; that no order has ever been made by this court restoring such transcript, nor has such record in fact been restored; that on May 21, 1906, a month after such record was destroyed, the justices of department one of this court, before whom the cause had been argued and submitted on February 27, 1906, signed and filed with the clerk of this court a decision in the cause, affirming the decree of the trial court, and on June 23, 1906, the clerk issued a remittitur in the case.

It is the claim of appellants on this motion that the decision and judgment of this court, having been made against them after the transcript on appeal had been destroyed by fire and without any restoration of it, is void.

We cannot agree with this view. The jurisdiction of this court on appeal is not determined by the presence or absence of a copy of the record from the trial court—the transcript on appeal. It acquires that jurisdiction immediately upon the filing of the notice of appeal in the lower court; acquires it for all purposes, and it is not divested of its jurisdiction, nor is such jurisdiction suspended, either on account of the failure to file a transcript on appeal or the loss or destruction of it after it is filed. It is true the statute provides for a certification to this court of the record made in the trial court and upon which the appeal to this court is to be heard, but that has nothing to do with conferring jurisdiction upon this court over the appeal. That is acquired as soon as the notice of appeal is filed, and this court may exercise such appellate jurisdiction long before any transcript is filed, and independent of it. It may dismiss the appeal, stay execu-

tion in the court below, or stay further proceedings therein, and make all necessary orders in aid of the appeal. The transcript on appeal is but the statutory method of bringing to the attention of the court the particular proceedings and matters which took place in the trial court and which this court is asked to review, and this is the sole purpose and function of the transcript. As supplemental to the statute requiring such certification ³³⁰ of the original record of the trial court to this court, our rules require that a certain number of copies, in addition to the original, shall be filed with the clerk of this court. These are vouched for by the appellant in each case as true copies, and, in this particular case, were in the possession of the court when its decision was made. We simply mention this as indicating that, while the original transcript in this case was destroyed, still duplicate copies, which had been filed with the original, were in the possession of the court when the case was under consideration and decided. Independent of this, however, we do not see how the fact of the destruction of the original transcript in any manner affected the jurisdiction of the court to dispose of the appeal. Our jurisdiction was not acquired by the filing of the transcript, and was not suspended by its destruction. That transcript was on file when the cause was argued and submitted for decision. As the only scope and purpose of the transcript is to present to the court the points involved in the appeal, it had served its purpose with the submission of the cause. In the subsequent preparation of its opinion the court could rely upon its memory of the points involved as presented in the original transcript, or refer to any copy of such transcript on file under the rules. As the filing of the transcript was not necessary to confer jurisdiction upon this court, neither was its continued existence necessary in order to authorize this court to render its decision on submission of the cause.

The motion is denied.

Shaw, J., Henshaw, J., Beatty, C. J., Sloss, J., and Angellotti, J., concurred.

Rehearing denied.

The Judgments and Proceedings of Probate Courts are usually accorded the same favorable presumptions and immunity from collateral attack as are those of courts of general jurisdiction: *Robbins v. Boulware*, 190 Mo. 33, 109 Am. St. Rep. 746; *Stocky v. Watkins*, 112 Ga.

268, 81 Am. St. Rep. 47; J. B. Watkins Land etc. Co. v. Mullen, 62 Kan. 1, 84 Am. St. Rep. 372.

A Judgment of a Court Admitting a Will to Probate is conclusive of its validity, unless appealed from, and ordinarily cannot be questioned in any other court, either incidentally or in a direct proceeding, for the purpose of impeaching it: *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *State v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510; *Cohen v. Herbert*, 205 Mo. 537, 120 Am. St. Rep. 772; *Tracy v. Muir*, 151 Cal. 365, post, p. 117.

Relief in Equity from the Decrees of Probate Courts is the subject of a note to *Froerich v. Lane*, 106 Am. St. Rep. 639; and the case of *Tracy v. Muir*, 151 Cal. 365, post, p. 117, and cases cited in the cross-reference note thereto.

TRACY v. MUIR.

[151 Cal. 363, 90 Pac. 832.]

PROBATE OF FORGED WILL, Relief in Equity Against by One not a Party.—An heir at law who does not appear in opposition to the probate of a will alleged by her to have been forged cannot be injured by any fraud practiced at the trial, and therefore cannot obtain relief in equity, where, under the statute, notwithstanding the admission of the will to probate, she had for one year thereafter the right to contest the will on the same ground as before such admission. (p. 120.)

PROBATE OF WILL, Notice of Want of, When does not Appear.—In a suit in equity to have the beneficiaries under a will declared trustees of the heirs on the ground that the will was a forgery, averments that the complainant lived in Honolulu at the death of the testator and up to the time of the admission of the will to probate and for a long time thereafter, and that prior to May 1, 1900 (which was nearly three years after such admission), she did not know of the forgery of the will nor of the acts of fraud and conspiracy on which she relies, do not negative knowledge of the admission of the will to probate within a year after it has occurred, during which time she was entitled to contest notwithstanding such probate. (p. 122.)

PROBATE OF WILLS, Conclusiveness of.—The determination of the genuineness of an instrument purporting to be a will is solely and exclusively for the court to which the proof of the will is confided, and its decision thereof is final and conclusive, and in the absence of state law, statutory or customary, providing otherwise, not subject to be questioned in any other court, or to be vacated or set aside by a court of chancery on any ground. (p. 122.)

RELIEF IN EQUITY Against the Probate of a Will cannot be obtained on the ground of fraud where the party seeking such relief might, notwithstanding the probate, have appeared within a year thereafter and contested the will on the same grounds and evidence as before its admission to probate, and he was not prevented from doing so by the beneficiaries of the will, though he alleged that he did not know that the will was forged until after the year expired. (p. 125.)

PROBATE OF A WILL, What is Extrinsic Fraud—Perjured Testimony.—The charge that the admission of a will to probate was due to conspiracy of the beneficiaries and to perjured testimony secured by them and received on the trial of the opposition to such probate does not establish a case of extrinsic fraud. (p. 125.)

PROBATE OF A WILL—Statutes Respecting, When not Constitutional as to Nonresidents.—A statute fixing the time for giving notice of application for the probate of a will will not be declared unconstitutional in its operation against a nonresident on the ground that by existing means of communication between the place of his residence and the place where the notice is given and the application is to be heard, he could not have seen the published notice in time to enable him to appear and oppose the probate on the day set for the hearing, when by the statute he is further given one year from the probate within which to contest the will. (p. 126.)

CONSTITUTIONAL LAW—What is not Forbidden Discrimination Against Nonresidents.—The fact that the statute relating to the probate of wills requires, in addition to the constructive service provided for, personal notice of the application for the probate of a will to be mailed to or personally served on the heirs of testator resident in the state, but makes no provision for such personal service on nonresident heirs, does not show a forbidden discrimination against such nonresidents violative of the fourteenth amendment to the constitution of the United States. (pp. 126, 127.)

William T. Baggett and George W. Monteith, for the appellant.

Campbell, Metson & Campbell and Thomas H. Breeze, for the respondents.

see The COURT. This is an appeal from a judgment in favor of defendants, given upon sustaining a demurrer to plaintiff's amended complaint. The action was one in equity to obtain a decree adjudging defendants, Elizabeth Muir and Isabella Curtis, to hold certain property distributed to them by decrees of partial distribution in the matter of the estate of one Jacob Z. Davis, deceased, as trustees for plaintiff, a daughter of a deceased brother of said Davis and one of his heirs at law, and the other heirs at law. The distribution to defendants was in accord with the terms of a document purporting to be the holographic will of said deceased, which was filed for probate in the superior court of the city and county of San Francisco upon November 16, 1896, and which, after contest instituted and maintained by certain heirs not including plaintiff, was, upon August 15, 1897, admitted to probate as the last will of deceased. Within the year after probate allowed for contest, a contest was instituted by heirs other than plaintiff, which was on stipulation of the parties thereto dismissed, and the probate of the will was never revoked.

The main basis of plaintiff's claim, that defendants should be held to be trustees as to the property so distributed to them, is that the will so admitted to probate was in fact a forgery, made by defendants and divers other persons pursuant to a conspiracy to obtain for defendants, by means of a forged will, the property of Davis, and that such persons, in the carrying into effect of such conspiracy, offered such forged will for probate, and procured the probate thereof by means of false and perjured testimony, the fraudulent concealment ³⁶⁷ from the court of genuine writings of the deceased which would have shown the forgery, and the fraudulent procurement by the conspirators of three of their secret agents and co-conspirators upon the jury which tried the contest before probate and rendered the verdict sustaining the will. Plaintiff was not a party to such contest, and never appeared in the probate proceeding until August 18, 1900, when she filed her petition contesting the validity of said will and asking that the probate thereof be revoked upon the same ground now urged in behalf of the pending proceeding. A demurrer to her petition was sustained and relief denied by the probate court, and upon appeal to this court the ruling of the lower court was affirmed, it being held that notwithstanding the residence of plaintiff outside of the country, her failure to contest within a year after the decree of probate was made barred her from the relief sought in the probate proceeding: *Estate of Davis*, 136 Cal. 590, 69 Pac. 412. At the time of the death of Davis, the offering of the will for probate and the probate thereof, "and for a long time thereafter," plaintiff was an actual resident and inhabitant of the city of Honolulu, in the then republic of Hawaii. She did not learn of the conspiracy or discover any of the frauds until May 1, 1900. She subsequently filed a petition to revoke the probate heretofore mentioned. The defendants were not heirs at law of Davis, being merely nieces of his deceased wife. The notices given of the original application for probate were given in full accord with the statutes of this state relative to such notices, but plaintiff also alleges that these statutes, as to nonresidents of the state, are unconstitutional and void, in that they are repugnant to the constitutional guaranty of due process of law, and deny persons subject to the jurisdiction of the state the equal protection of its laws.

This is substantially, so far as is material, the case made by the amended complaint. Fraud in obtaining the decrees

of partial distribution is also alleged, but we do not regard these allegations important if the probate of the will cannot be successfully attacked in some way. As already stated, such decrees of distribution were in strict accord with the terms of the will, and necessarily followed the decree admitting the will to probate. Unless plaintiff can succeed in charging defendants as trustees because of the fraudulent procurement ~~and~~ of probate of a forged will, it is clear that she must fail, for she can have no independent right to complain of a distribution in full accord with the terms of a will, the probate of which has not been revoked, and which is unassailable either by proceedings to revoke the probate or in an equitable action to have the distributees thereunder decreed to be trustees for her: See *In re Davis' Estate*, 151 Cal. 318, ante, p. 105, 86 Pac. 183.

Passing for the moment the question as to the validity of our statute relative to the notice to be given of an application for probate of a will, and assuming that the probate court had jurisdiction of the proceedings as against this plaintiff, the question presented is whether an action in equity can be maintained for the purpose of having the beneficiaries under a forged will, the probate of which has been obtained by such frauds as are alleged in the amended complaint, declared trustees for those who would but for such will have succeeded to the estate.

It is to be stated at the outset that, in view of the provisions of our statutes relative to probate of wills, it is manifest that plaintiff could not have been injured by the frauds alleged to have been perpetrated on the trial of the contest before probate for the purpose of securing a verdict sustaining the will, and is in no position to complain thereof. This includes, of course, the alleged fraudulent introduction of certain agents of the conspirators upon the jury which tried that contest. Plaintiff was not a party to that contest, and was in no degree estopped or concluded by the result thereof: *Estate of Cunningham*, 54 Cal. 556. The only effect as to her of the decree entered upon that contest was to fix the limit of time within which she might herself contest the will. Under the express terms of the statute, she could at any time within one year after the probate have contested the will upon any of the grounds that could have been urged against it before probate, and upon such contest no different measure of evidence or manner of procedure from that required before probate

was essential to a successful attack: See *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441. If, on such a contest after probate, the genuineness of the will is not sufficiently proved, the probate must be annulled and revoked: Code Civ. Proc., secs. 1327, 1329, 1330.

³⁰⁰ It must also be borne in mind that, under the allegations of the amended complaint, neither of the defendants nor any of their alleged co-conspirators sustained any fiduciary relation to the plaintiff, or the other heirs at law. They were absolute strangers, asserting as against the world the genuineness of an instrument which would give the beneficiaries under the will the property of the deceased as against the heirs, and they occupied no position of trust or confidence which imposed upon them any special duty as to plaintiff.

It is further to be observed that the amended complaint is destitute of allegation of any act on the part of any of the alleged conspirators, the effect of which could have been to prevent the plaintiff from appearing in the probate court at any time within one year after the probate, and contesting the will upon all or any of the grounds specified in the statute, including the very ground upon which she here bases her claim—viz., that the will had never been executed by the deceased, but was a forgery.

It is also to be noted that there is no allegation that plaintiff had not learned, prior to the offer of the alleged will for probate, of the death of deceased, or that she did not then know that he was, at the time of his death, a resident of the city and county of San Francisco, and it was not alleged that she did not have actual knowledge of the admission of the will to probate in ample time to have enabled her to contest it within the year after probate. Her complaint appears to have been carefully drawn with a view to excluding anything like an allegation of want of actual knowledge within such year of such proceedings in the matter of said estate as were matters of public record, except in regard to the petition for revocation filed within the year by Anna Wilson and others, which it is alleged she did not know of until August 14, 1900. Her general allegations in regard to want of knowledge are, that at the time of the death of deceased and up to the time of the admissions of the alleged will to probate, August 17, 1897, "and for a long time thereafter," she was actually living in Honolulu, and that prior to May 1, 1900, "she did not know of the conspiracy hereinbefore mentioned, nor of

any fact or circumstance connected therewith, nor did she know of the forgery of said will, nor that the same was not genuine, nor did she have any knowledge whatever prior to ⁸⁷⁰ that date of any fraud, conspiracy, deception or concealment specified and referred to in paragraph V of this complaint." There is in this no allegation of want of actual knowledge within the year after probate of such court proceedings in the matter of the estate as were evidenced by the records of the court, the allegations being confined to actual knowledge as to the conspiracy, and the forgery and the falsity of the alleged will, and the fraud, deception and concealment practiced in obtaining its admission to probate. In the absence of positive averment to the contrary, it must be presumed that plaintiff had actual knowledge of the order admitting the will to probate made nearly a year after its offer for probate, either at the time it was made, or very shortly thereafter and within time for contest: See *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Tynan v. Kerns*, 119 Cal. 447, 51 Pac. 693.

Whatever might be the effect of the presence of some such feature in the case, we are satisfied that, under the circumstances above stated, the unrevoked probate decree must now be accepted as conclusive upon the question of the genuineness of the will. If plaintiff cannot be allowed in this action to show that the will was not the genuine will of deceased, it is needless to say that no cause of action cognizable by a court of equity is stated by her amended complaint.

It appears to be firmly settled by the overwhelming weight of authority that, under such a system as exists in this state for the admission of wills to probate, the determination of the question of the genuineness of an instrument purporting to be a will is solely and exclusively for the court to which the proof of wills is confided, and that its decision therein is final and conclusive, and in the absence of "state law, statutory or customary," providing otherwise (*O'Callaghan v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. Rep. 727, 50 L. ed. 101), not subject, except on an appeal to a higher court, to be questioned in any other court, or to be set aside or vacated by the court of chancery on any ground: *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Broderick Will Case*, 21 Wall. 503, 22 L. ed. 599, and authorities there cited; *Langdon v. Blackburn*, 109 Cal. 19, 41 Pac. 814. Under this rule, as long as the probate stands the will must be recognized and admitted in all courts to be

valid, the unrevoked decree of probate standing as absolute and conclusive proof of its genuineness. This rule is stated to be an exception ⁸⁷¹ to the general doctrine that a court of equity may set aside judgments obtained by fraud or mistake, and it has been suggested by some of the courts and writers that no satisfactory ground can be discovered for such an exception. However this may be, it is a rule that is firmly established by the authorities, and one that has been declared and applied by this court. In the leading case of *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118, the matter was exhaustively discussed and the authorities reviewed. It is unnecessary to here restate the reasoning of the court in that case, or to attempt to add thereto. In the *Broderick Will Case*, 21 Wall. 503, 22 L. ed. 509, upon a full discussion of the question, it was held by the United States supreme court, as stated by this court in *Langdon v. Blackburn*, 109 Cal. 19, 41 Pac. 814, that "a court of equity has no jurisdiction to avoid a will or to set aside the probate thereof on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the courts of probate; and also that a court of equity will not give relief by charging the executor of a will or a legatee with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief by refusing probate of the will in whole or in part." This rule we take to be absolute, at least in every case where there has been no breach of duty arising from a fiduciary relation on the part of those securing the probate of the will, no such extraneous fraud as operates to prevent the heir from appearing in the probate court and there contesting the will and exhibiting fully his case against the same, and no lack of actual knowledge of the pendency of the probate proceeding operating to deprive the heir of an opportunity to so appear in the probate court and make his contest. The case of such lack of actual knowledge is stated as a possible exception, in view of the doctrine declared in *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563, 16 L. R. A. 361, and in *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007, to the effect that when a judgment has been obtained upon a false and fraudulent claim upon constructive service of summons, and the party against whom it is obtained had no actual notice of the pendency of the action in time to appear therein and set up his defense, a court of equity will relieve such party from

the judgment, and because it has been suggested ³⁷² here that this doctrine may be applicable in the matter of a decree admitting a will to probate. In some or perhaps all of the cases just suggested, equity might grant some appropriate relief as between the parties, if the complaining party has not been guilty of laches, but as to this we do not decide. This is not such a case.

A proceeding for the probate of a will is a proceeding in rem.

By the offer of the will for probate, the proponents tender to the world the issue as to its genuineness. Any person interested may appear and contest the instrument so offered upon various grounds, including all grounds substantially affecting its validity or the question of its due execution. Failing to appear and contest before probate, the right exists for a full year after probate. One who must be held to have had actual notice of the proceedings in time to make his contest, and who fails to take advantage of the opportunity afforded of opposing the will by appearing and contesting within the time allowed by law, must, at least unless he can be held to have been prevented from so appearing and contesting by some fraud of those procuring the probate, be held concluded by the decree as to any matter concerning which he could have obtained relief by a contest. It can be no excuse for his failure to appear and contest that he did not know that the alleged will was not genuine. That it was genuine was one of the very issues tendered him by his adversary, which he was called upon to meet within the time allowed by law, or forever thereafter admit.

The three California cases relied on by plaintiff, *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282, *Aldrich v. Barton*, 138 Cal. 220, 94 Am. St. Rep. 43, 71 Pac. 169, and *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703, are not in point here. None of them involved any question as to the effect of a decree admitting a will to probate. In addition to this, there was present in the first two cases fraud operating to prevent the injured party from presenting his case in the original proceeding, while in all of the cases the persons whose misconduct was held sufficient to impose an involuntary trust upon the beneficiaries of their acts sustained a fiduciary relation to the persons defrauded. This is disputed by counsel for plaintiff as to the case of *Sohler v.* ³⁷³ *Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282,

but an examination of the opinion will show that the statement in the opinion of the learned judge of the trial court to that effect is correct. The statement of Mr. Pomeroy in his *Equity Jurisprudence* (section 919), that where "a probate is obtained by fraud, equity may declare the executor or other person deriving title under it, a trustee for the party defrauded," must be taken as referring only to such cases as those we have already referred to as possible exceptions to the rule. Such was the case of *Barnsley v. Powell*, 1 Ves. Sr. 284, cited by him, where a deed of consent to the probate had been fraudulently procured. It cannot be held to include such frauds as could have been relieved against by the probate court by refusing the probate of the will, where the injured party had actual notice of the probate proceeding in time to make his contest, and was not prevented from so doing by some fraud of the other party.

The allegations as to conspiracy add nothing to the legal effect of plaintiff's complaint. The sum and substance of that complaint is that she has been deprived of property to which she would have succeeded as heir, by means of a false and forged will, established in the court having the jurisdiction to determine as to its validity by perjured testimony. Whether or not the forgery and perjury were the result of a conspiracy appears to be entirely immaterial in determining her rights to pursue the property in the hands of the beneficiaries. We are unable to see, as suggested by counsel for plaintiff, that such a conspiracy could operate to change what would otherwise be intrinsic fraud into extrinsic fraud: See *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336.

The alleged validity of our statute relative to the notice to be given of an application for probate of a will (Code Civ. Proc., secs. 1303, 1304) as to nonresidents who have no actual notice, is principally based upon the claim that the notice thereby provided for is wholly inadequate to enable one situated as was this plaintiff, in any contingency, to receive the notice in time to appear and contest the probate of the will on the original hearing. The notice provided by section 1303 of the Code of Civil Procedure is one of at least ten days, the same to be given by publication. Plaintiff was at that time a resident of Honolulu, in the then republic of Hawaii, and ⁸⁷⁴ could not have received the notice in time to permit her to so appear. The effect of a provision making such notice

sufficient is, it is urged, to deprive one situated as was this plaintiff of her property without due process of law. This particular contention has been before made in this court by this appellant, and overruled. It was held in *Estate of Davis*, 136 Cal. 590, 69 Pac. 412, that inasmuch as the rights of the nonresident heir are in no way concluded by the decree, he having an entire year thereafter in which to attack the will on the same grounds and for the same reasons that he could attack it before probate, the measure of evidence demanded of him for a successful attack being no different in the two cases, due process of law is in no degree denied to the nonresident heir by the provision as to notice of the original hearing. This ruling was affirmed in *Re Davis' Estate*, 151 Cal. 318, ante, p. 105, 86 Pac. 183, the court saying: "Whether or not this be a proper case for applying the doctrine of *res adjudicata* or that of the law of the case, we are satisfied with the conclusion reached and adhere to it." In *O'Callaghan v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. Rep. 727, 50 L. ed. 101, the United States supreme court has decided a practically similar question in the same way. That case arose under the laws of Washington, the claim being made that the failure to give notice of an application for the probate of a nuncupative will, as required by the statute, made the admission to probate of such will a violation of the due-process clause of the fourteenth amendment to the constitution of the United States. The laws of Washington as to a contest within one year after probate were substantially similar to ours. It was held that, conceding for the purposes of argument that absence of notice might afford substantial ground to contend that rights protected by the constitution of the United States had been violated, if by its omission the parties were deprived of or lost their right to deny the will or question its probate, the full right given by the statute was a complete answer to the claim made under the federal constitution.

The further contention that section 1304 of the Code of Civil Procedure, requiring, in addition to the constructive notice provided for, personal notice to be mailed to or personally served on heirs of the testator residing in the state, but making no provision for such personal notice to nonresident ³⁷⁵ heirs, is violative of the fourteenth amendment of the federal constitution, as discriminating against nonresidents, we think to be entirely without merit. The very fact

that one is a nonresident of the state is, from the necessities of the case, a sufficient reason for a difference in the manner of notice, and has always been recognized as such. If the manner of notice provided for an absent party is reasonable and adequate for that purpose, he cannot complain thereof on the mere ground that it is different from the notice provided for residents. He has not been deprived of due process of law: See, also, *Estate of Davis*, 136 Cal. 590, 69 Pac. 412. The other federal questions suggested are disposed of by what has already been said upon the merits of the case.

For the reasons given above, the amended complaint failed to state a cause of action.

The judgment appealed from is affirmed.

Beatty, C. J., concurred in the judgment.

On the Conclusiveness of Decrees Admitting Wills to Probate, see *Estate of Davis*, 151 Cal. 318, ante, p. 105, and cases cited in the cross-reference note thereto.

On Relief in Equity from the Decrees of Probate Courts, see the note to *Froerich v. Lane*, 106 Am. St. Rep. 639. It has recently been held that equity has jurisdiction to set aside the orders of a probate court procured through the fraudulent suppression of the decedent's will: *Ewing v. Lamphere*, 147 Mich. 659, 118 Am. St. Rep. 563. For other recent authorities recognizing the jurisdiction of equity to grant relief from probate orders procured by fraud, see *Nelson v. Cowling*, 77 Ark. 351, 113 Am. St. Rep. 155; *Willis v. Rice*, 141 Ala. 168, 109 Am. St. Rep. 26.

MARLOW v. SOUTHERN PACIFIC COMPANY.

[151 Cal. 383, 90 Pac. 928.]

CARRIERS OF PASSENGERS, Agents of are not Exclusive Judges of Identification.—Under a ticket signed by a passenger and specifying that the purchaser will sign her name and otherwise identify herself as such passenger when called upon to do so by any conductor or agent or agents of the carrier, they are not made absolute arbiters. The utmost they can require is reasonably satisfactory evidence of identification, and the carrier may therefore be held answerable if they wrongfully eject a passenger from a train. (p. 129.)

DAMAGES, When not Excessive for Ejecting a Passenger from a Train.—Five hundred dollars is not an excessive sum to award for the wrongful ejection of a married woman, traveling with her infant, from a train, in the night-time, at a station far from home, and without baggage or money. (p. 130.)

J. W. McKinley, for the appellant.

Byron Waters and Winn Wylie, for the respondents.

³⁸⁴ HENSHAW, J. Plaintiffs brought their action to recover damages for the unlawful ejectment of Mrs. Marlow from a train of defendant upon which she was a passenger. The cause was tried before the court, which gave judgment for plaintiffs in the sum of five hundred dollars, from which judgment and from the order denying its motion for a new trial defendant appeals.

Plaintiff Edward Marlow had purchased for his wife a ticket entitling her to travel from Maricopa to Los Angeles and return. She was upon her return trip from Los Angeles to Maricopa, when she was ordered from the train by defendant's agent. Her ticket contained the following provision: "That I, the original purchaser, will sign my name and otherwise identify myself as such purchaser, whenever called upon so to do by any conductor or agent of the line or lines over which the ticket reads." This agreement was signed by Mrs. Marlow.

Appellant's first point is that there is no evidence showing that plaintiff identified herself by signature or otherwise in accordance with the terms of the ticket, and that she was therefore not entitled to passage thereon. The facts are that Mrs. Marlow was traveling with a nursing baby about a year and a half old, and that her trunk had been checked through to her destination. The train agent of defendant had asked for her signature while the train was in motion. While admitting a similarity, he expressed himself dissatisfied with a comparison which he made between the signature written for him and that upon the face of the ticket. Mrs. Marlow protested that the ticket was honestly hers, and asked for an opportunity to sign when the train was not in motion. She did so sign repeatedly, and still the train agent was unsatisfied. He asked her if she knew anybody on the train, or if there were any identifying marks upon her clothing. She knew nobody on the train and was unable to show the required identification marks. She still protested, however, that it was her ticket, declared that she had not money sufficient to pay her fare, but announced her willingness to pledge a ring, and begged to be allowed to continue her journey to Maricopa, where she assured the agent that friends ³⁸⁵ would identify her. The ticket was signed "Mrs. Edward Marlow" and the identification marks upon the ticket described the owner as "female, stout, middle-aged, light eyes, dark hair." That the plaintiff had in charge a nursing baby

was at least some evidence that she was a married woman, and it is not contended that in person she did not meet the description above given. Nevertheless, and despite her protest, her ticket was taken by the train agent and was reported to the conductor, and it became the conductor's duty to cause her to leave the train, which unpleasant duty he performed with courtesy. Mrs. Marlow was thus left at Colton with the care of a nursing, frightened, crying child, without her trunk, and without money. She was aided in telegraphing to her husband and in obtaining a night's lodging.

These facts present a different case from that of *Southern Ry. Co. v. Barlow*, 104 Ga. 213, 69 Am. St. Rep. 166, 30 S. E. 732, cited by appellant. That case holds merely that under a contract such as this, a validating agent who was not satisfied with the signature alone was justified in requiring other evidence of identity, and that the mere opinion of a hotel clerk as to the genuineness of the signature was no better evidence than the signature itself. *Central Georgia Ry. Co. v. Cannon*, 106 Ga. 828, 32 S. E. 874, a case also relied upon by appellant, was one where the plaintiff, against the advice of the agent, printed his name on the ticket instead of writing it in the first instance, thereby making it impracticable to identify himself by writing. The court very properly declared that it was incumbent upon such purchaser as a condition precedent to having the ticket signed and stamped, to furnish such proof of his identity, and of the fact that he was the original purchaser, as would be sufficient to satisfy a reasonable man, and that under such a contract the validating agent was entitled to call for other proof of identity than that offered merely by the holder writing his name. Certainly the evidence, as above pointed out, presents an entirely different case from those referred to, and furnishes what should have been sufficient assurance of plaintiff's right to travel.

Under this contract the agents of defendant were not made the absolute arbiters, as appellant contends, upon the ~~886~~ authority of *Church v. Shanklin*, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207. The utmost which the agents could require was reasonably satisfactory evidence of identification. *Church v. Shanklin* was a case under contract whereby title to real estate was to be perfected "to the satisfaction of Church & Cory, attorneys," and this court held that the expression of

their satisfaction with the title was what the parties had stipulated should be had, and that Church & Cory thus became umpires and arbiters whose judgment was final. Such, as we have said, is not the case here presented, nor will it be said that under the circumstances indicated the judgment was excessive.

The judgment and order appealed from are therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

A Railway Ticket stipulating that the purchaser shall, when called upon by a conductor, identify himself as such purchaser, makes it incumbent on him to use reasonable means of identifying himself if required: *Southern Ry. Co. v. Barlow*, 104 Ga. 213, 69 Am. St. Rep. 166. But the identification need be by only such proof as would satisfy a reasonable, conscientious, and prudent man; it need not necessarily be such as satisfies the conductor: *Southern Ry. Co. v. Cassell*, 122 Ky. 317.

CHAPMAN v. MOORE.

[151 Cal. 509, 91 Pac. 324.]

ABATEMENT, Plea of in Suit to Quiet Title.—An action to quiet title is properly abated as to a defendant when it appears that a prior action brought by the plaintiff against such defendant to quiet title to the same property is still pending. (p. 132.)

JUDGMENT Based on Constructive Service of Process.—The statement in an affidavit for an order for the publication of summons need not show what the persons of whom the plaintiff inquired respecting the place of residence of the defendant told the plaintiff, if it further appears by the affidavit that such defendant cannot be found within the state after diligent search for him by the affiant, and that such search consisted of making inquiries of each and every person from whom he had reason to believe he would receive knowledge of the whereabouts of the defendant. (pp. 134, 135.)

JUDGMENT, Admissibility of as a Muniment of Title.—A judgment is admissible against one not a party thereto as a muniment of title. (p. 135.)

JUDGMENT Quieting Title, Admissibility and Effect of as Against Third Persons.—If it is admitted at the trial that the legal title to property at a date specified was in A, a judgment against him at a subsequent date in favor of B vesting title in him to the same property is admissible in a subsequent action against C for the purpose of proving that A's title had at and before the entry of such judgment passed to B. (p. 136.)

Charles Lantz, for the appellant.

William Chambers, for the respondents.

⁵¹⁰ LORIGAN, J. This action was originally commenced by M. M. Davis, as plaintiff, and subsequent to its commencement the present plaintiff, William Chapman, was substituted in the superior court for said Davis as plaintiff.

The action was brought to quiet title to lot 4 in block "C" of the Sunset Tract in the city of Los Angeles, the plaintiff making the usual allegations of ownership of the property, and the defendants asserting claims thereto adverse to him.

The defendant O. A. Moore in her answer denied the alleged ownership of plaintiff, and asserted ownership of the lot to be in herself; the defendants Strohm, in a separate answer, also denied the ownership of plaintiff, and asserted that the defendant Susan Strohm was the owner of the property. These latter defendants also pleaded in abatement of the present action the pendency of a prior action brought against them by M. M. Davis to quiet title to this same lot.

Upon the trial the court found in favor of the defendants Strohm on their plea of abatement; found also that plaintiff was not the owner of the property, and entered judgment that the action abate as to the Strohms, and in favor of O. A. Moore for her costs.

Plaintiff appeals from the judgment and an order denying a motion made by him for a new trial.

On the trial of the cause the only evidence presented upon the issue of ownership of the property was that offered by the plaintiff. No evidence was offered by the defendants at all, save by the Strohms in support of their plea in abatement.

⁵¹¹ As grounds for a reversal it is insisted by appellant that the court erred in sustaining the plea of abatement interposed by the Strohms, that it erred also in rejecting certain evidence offered by plaintiff, and that the finding of the court that plaintiff was not the owner of the property in dispute was not justified by the evidence.

As to the plea in abatement. This was the first issue tried by the court. In support of it the Strohms offered in evidence the record in the suit of M. M. Davis versus B. E. Ninde, Samuel Strohm, Susan Strohm, William Patterson et al., which showed that a suit to quiet title to the same lot involved in the action then on trial was commenced February 3, 1903 (the complaint in this action was filed August 27, 1904), and was then pending as to the said defendants Strohm. This was the only evidence offered, and at its conclusion a

motion was made on behalf of said defendants Strohm, on such showing, to have this action as to them dismissed, which was granted. The showing was sufficient to sustain the plea, and upon it the Strohms were entitled to have the subsequent action against them abated: Code Civ. Proc., secs. 430 (subd. 2), 433.

The Strohms by this order of the court having been dismissed from the case, the trial then proceeded between the plaintiff and the defendant Moore.

To sustain his title against her, plaintiff offered in evidence, among other documents, a certificate of sale of said property made July 3, 1895, to the state of California for state and county taxes for the year 1894; a deed of said property, dated July 6, 1900, from the county tax collector to the state of California for said taxes; also a deed of said property from said tax collector to plaintiff, dated September 21, 1901, made pursuant to an authorization of the state controller to sell said land. The court refused, upon defendants' objection, to admit such instruments in evidence, and this ruling is assigned as error. In the briefs of respondent no grounds are suggested in support of the ruling and no specific objections are urged against the validity of these several tax sale instruments. Counsel for respondent simply says: "The questions as to the validity of this state deed involved in this action are the same as those now before the supreme court in the case of Barrett [which should have been Baird] versus Monroe, Los Angeles No. 1623." The case of Baird v. Monroe, 150 Cal. 560, ⁵¹² 89 Pac. 352, had not been decided by this court when the briefs in this present appeal were filed, but it has been since, and the various grounds urged against the validity of a tax deed there involved, similar to the one in question here, were deemed untenable and the validity of the deed sustained. It is unnecessary to refer here to the objections urged against the deed considered in that case, or to restate the grounds upon which the court sustained its validity, as they will fully appear from an examination of the decision rendered: Baird v. Monroe, 150 Cal. 560, 89 Pac. 352. See, also, Carter v. Osborn, 150 Cal. 620, 89 Pac. 608. It follows, therefore, that the trial court erred in refusing to admit in evidence the tax deed offered by plaintiff.

The only other questions presented upon this appeal involve the validity of a certain judgment and its effect, if valid.

It was stipulated on the trial that a certain deed, dated and recorded in October, 1887, conveyed title in fee to the lot of land in controversy here to one Walter Patterson. Such admission being made, the plaintiff offered in evidence a judgment-roll in a suit brought by M. M. Davis, the predecessor of plaintiff, versus B. E. Ninde, Samuel Strohm, Susan Strohm, and Walter Patterson (the same action heretofore referred to as pleaded in bar by the Strohms), which showed that an action to quiet title to this same property was commenced by Davis against the defendants by complaint filed February 3, 1903; that an affidavit and order for publication of summons on one of the defendants—Walter Patterson—were subsequently made and filed and service of the summons made upon said Patterson by publication; that the default of Patterson was subsequently entered, and thereafter, on April 4, 1904, a decree was entered quieting the title of said Davis to said lot against the said defendant Patterson. No objection was offered to the admission of the judgment-roll, and it was received in evidence. The plaintiff supplemented this offer by proof of a conveyance of the lot in controversy from M. M. Davis to himself, and rested his case.

It is insisted by appellant that this showing—the admission of title in Patterson at a given date, the decree quieting title subsequently obtained against Patterson by plaintiff's predecessor Davis, and the conveyance of Davis to himself—⁵¹² sustained his claim of ownership to the property against the defendant Moore, and the finding of the court that he was not such owner was not justified by the evidence.

This claim of appellant is, in our judgment, unquestionably true, unless, as insisted by respondent, the decree quieting title to the lot in question against Patterson in the case just referred to is void, or unless there is some merit in the position of respondent, that, even if valid, the decree was not available to plaintiff as a muniment of title against her.

Now, as to the validity of the decree. The order for service of summons upon the defendant Patterson by publication was based on an affidavit of the attorney for Davis purporting to make out a sufficient showing that defendant Patterson, at the time when the service of summons was sought to be made upon him, could not with due diligence be found in the state of California. It is contended by respondent, and this is the only point made as to the sufficiency of the affidavit, that while it shows that the affiant made inquiries to ascertain the

whereabouts of Patterson it does not appear what information he got from those of whom he made the inquiries; that for all the affidavit shows these persons may have informed him that Patterson was residing in Los Angeles or somewhere in the state; that a statement of the result of his inquiries in the affidavit was essential to warrant an order of publication; that without it the court had no jurisdiction to make the order, and the order for the service of summons and the service under it and the decree were all void.

It is true, as claimed by respondent, that the affidavit fails to state what information the affiant received concerning the whereabouts of Patterson from those of whom he inquired concerning him. But in the case of *Ligare v. California S. R. Co.*, 76 Cal. 610, 18 Pac. 777, it was held that such an omission was not fatal, if from the other facts stated in the affidavit it could be reasonably inferred that such inquiries to ascertain the whereabouts of the defendant were unavailing. In the case at bar the affidavit, in so far as it bears upon the point involved, stated that Walter Patterson could not be found in the state of California after diligent search made therein for him by affiant; that such diligent search consisted of making inquiries of each and every person from whom he had reason to believe he would receive knowledge of the whereabouts ⁵¹⁴ of Patterson. Then follows a statement of the persons of whom he made inquiries and why he expected them to know of his whereabouts. In the case cited the affidavit under consideration there contained the same statements, but, like the case at bar, failed to state what the result of the inquiries was. It was held, however, that the affidavit was sufficient, the court saying: "It is argued that the affidavit for publication was insufficient on the question of diligence. The code provides that service may be made by publication (among other cases) where the person on whom it is to be made 'cannot, after due diligence, be found within the state': Code Civ. Proc., sec. 412. The affidavit in question first states that certain defendants, among whom is the plaintiff here, 'have been sought for to obtain service of summons thereon, but, after diligent search and inquiry, cannot be found within the state.' It then goes on to show what kind of search and inquiry have been made, viz., that the affiant 'has made inquiry of all persons from whom he could expect to obtain information as to the residence of said defendants.' It is not expressly stated what was the result of

these inquiries. But the statement must be read in connection with what preceded it, viz., that after inquiry the said defendants 'cannot be found within the state.' And so reading it, we think it is to be inferred that the inquiries were fruitless." The court held the decree attacked in that case for insufficiency of the affidavit of publication valid against a collateral attack such as is made here, and upon the authority of that case the affidavit here must be held sufficient and the decree quieting title to the lot in question in favor of Davis and against Patterson to be valid.

Now, as to the effect of the decree. While respondent has contended here, though ineffectually, that the decree is void, he also insists that, even if valid, the trial court properly rejected it when offered as constituting a muniment of title in behalf of plaintiff against the defendant; that the decree was only conclusive against Patterson and parties in privity with him having notice of the judgment (Code Civ. Proc., sec. 1908, subd. 2), and did not affect the rights of the defendant Moore. And it is asserted by respondent in his brief that this was the view taken by the trial court. If so, it was incorrect.

While the general rule undoubtedly is that judgments bind only parties and privies, still there is an exception to the rule⁵¹⁵ universally recognized which sustains their admissibility against third parties who are not parties or privies to the judgments for certain purposes. This exception is that the judgment rendered in an action involving title to property, and in which it is determined that the title is in one of the parties to the action, is admissible in evidence in behalf of the party claiming under the judgment, and subsequently asserting a claim to the property affected by it as a link in his chain of title, although such judgment would not be conclusive on the party against whom it is offered because he was not a party or privy thereto. It is admissible in evidence, not for the purpose of defeating or affecting any claim or title of a party who was not a party or privy to such judgment, but solely as a muniment in an asserted title.

In *Barr v. Gratz*, 4 Wheat. 213, 4 L. ed. 553, the rule is stated: "It is true that, in general, judgments or decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case where the decree is not introduced as per se binding upon any rights of the other party, but as an introductory fact to a link in the chain of

plaintiff's title and constituting a part of the muniments of his estate. . . . To reject the proof of the decree would be, in effect, to declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger, it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta*." To the same effect are the cases of *Kurtz v. St. Paul etc. R. Co.*, 65 Minn. 60, 67 N. W. 808; *Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320; *Railroad Equip. Co. v. Blair*, 145 N. Y. 607, 39 N. E. 962; *Bussey v. Dodge*, 94 Ga. 584, 21 S. E. 151; *Skelly v. Jones*, 70 N. Y. Supp. 447, 61 App. Div. 173. See, also, 24 Am. & Eng. Ency. of Law, p. 757; *Freeman on Judgments*, sec. 416.

These authorities declare the exception to the general rule to be well established that a party claiming under a judgment is entitled to prove it as a muniment in his chain of title, and we content ourselves simply with a reference to them, as nothing to the contrary is cited by respondent.

⁵¹⁶ Applying this rule, then, to the effect of this judgment considered with the other proofs of title made by appellant, it is clear that the finding of the court complained of was not justified by the evidence. It was conceded on the trial that in 1887 the legal title to the lot in controversy was in Walter Patterson, and the presumption is that the legal title continued in him until it was shown that he had conveyed it, or that in some way it had become extinguished or his title defeated or barred. It was defeated and barred by the judgment obtained by Davis, the predecessor of plaintiff, against Patterson in 1894. As between these two it was there adjudged that the legal title, conceded, and theretofore presumed to continue, in Patterson, was, as against him, in Davis, and such adjudication was as effective evidence of the title to the property in the latter, and as conclusive of any claim of Patterson or his privies, as if Patterson had made him a conveyance of it by deed. A deed from Patterson to Davis would have been conclusive evidence against Patterson that legal title had in fact been transferred to Davis by him, and of course would be admissible as a link in the asserted claim of plaintiff of title to the property. So with the judgment. As it was as effective against Patterson's claim of title as if he had made Davis a deed to the property, it was, under the rule

heretofore stated, admissible for the same purpose that his deed would have been—as a muniment of title. Being so admissible, it, with the previous concession of legal title in Patterson and the presumption arising therefrom, together with the conveyance from Davis to plaintiff, established in him prima facie title to the property, which in the absence of any evidence of title in the defendant would have warranted a judgment in his favor against the defendant Moore, and the finding of the court in the face of this prima facie showing that plaintiff was not the owner was not justified by the evidence. These are the only points made in the case, and for the reasons given the judgment and order denying the motion of appellant for a new trial are reversed, with costs on appeal to appellant, and affirmed as to the Strohm, with costs in their favor.

McFarland, J., and Henshaw, J., concurred.

A Decree Constituting a Link in a Chain of Title is competent evidence thereof, not only against the parties, but against all the world: *Building etc. Co. v. Fray*, 96 Va. 559, 32 S. E. 58; *Kurtz v. St. Paul etc. R. R. Co.*, 61 Minn. 18, 63 N. W. 1. A judgment quieting title, or determining conflicting claims thereto, is neither a link in the chain of title nor a muniment of title. It does not purport to transfer title from one person to another, nor to require or authorize such transfer; but merely to ascertain and declare in whom title was vested prior to the commencement of the action in which such judgment was entered. We are therefore surprised at the decision in the principal case holding a judgment admissible against one neither a party nor a privy thereto.

HALL v. JAMESON.

[151 Cal. 606, 91 Pac. 518.]

MORTGAGE AND NOTE to be Construed Together.—A promissory note and the mortgage given to secure it must be read in connection with each other and as constituting one contract. (p. 139.)

TRUSTEE, Note Executed by, When Makes Him Personally Liable.—A note in the ordinary form containing a personal promise to pay, and signed W. H. J., trustee, is his personal obligation, upon which a judgment may be recovered against him. (p. 140.)

TRUSTEE, When Personally Liable upon a Note and Mortgage.—If a trustee executes a note which he subscribes as trustee and a mortgage to secure its payment, he having no power to bind anyone but himself by his promise for the payment of the money, though he has power to mortgage the trust property, he is personally liable on the note and the covenant for the payment of the money, though the mortgage refers to the trust and shows the intent to pledge trust property. (p. 141.)

THE POWER OF A TRUSTEE to Mortgage does not Include the Power to Make a Personal Promise on behalf of the beneficiaries

of the trustor that they or either of them should pay the money. (p. 142.)

LIMITATIONS OF ACTION for Balance Due upon a Note and Mortgage.—When a note and mortgage are given, with power to the mortgagee on default in payment of interest, to sell the premises at public auction, and out of the proceeds of the sale to pay such note and costs, and default being made, the sale follows, realizing only part of the debt, the time for bringing an action for the balance due is still controlled by the terms of the note, and the statute of limitations does not commence to run thereon until the note becomes due according to the promise contained therein. (p. 145.)

E. W. Freeman, for the appellant.

John G. North, for the respondent.

608 SHAW, J. This is a suit upon a promissory note in the following words:

“2800.

Boston, June 8th, 1897.

“For value received, I promise to pay to Nathaniel U. Walker, trustee under the will of Francis Jackson, for the benefit of Harriet M. Palmer, or order, two thousand eight hundred dollars, in three years from this date with interest, to be paid semi-annually, at the rate of five per centum per annum, until this note is paid in full.

“WILLIAM H. JAMESON, Trustee.”

This note was assigned to plaintiff before suit. Judgment was given for the plaintiff and the defendant's motion for a new trial was denied. The defendant appeals from the judgment and order.

1. It is first contended that the note is not binding upon the defendant personally, but only upon him in his capacity as trustee, and that therefore the personal judgment against him is erroneous.

Prior to the execution of the note, one William L. Joy had executed a deed conveying to the defendant, as trustee for certain stated purposes, a tract of land in Massachusetts. The deed empowered the defendant, as trustee, “to mortgage said property, or any part thereof, from time to time for such sums, to such persons or corporations [and] upon such terms as he may deem expedient,” and gave directions as to the disposition of the money thus to be obtained. In 609 pursuance of this power the defendant borrowed of Walker, the payee of the note, the sum of two thousand eight hundred dollars, for which he executed the above note, and at the same time, to secure its payment, he executed to Walker a mortgage upon the Joy land. This mortgage, being part of the same transaction, must be read in connection

with the note, and the whole construed as one contract in order to arrive at the true meaning of each. The mortgage was in the common-law form, purporting to convey the land to Walker as security for the debt. It began thus: "Know all men by these presents, that I, William H. Jameson, as I am trustee under a certain deed from William L. Joy, by virtue of the power in said deed contained and every other power me hereto enabling, in consideration of two thousand eight hundred dollars do hereby give, grant, bargain, sell and convey unto the said Nathaniel U. Walker," etc., the land particularly described. The condition was in part as follows: "Provided, nevertheless, that, if I, my heirs, executors, administrators, or assigns, shall pay unto the grantee, or assigns, the sum of two thousand eight hundred dollars in three years from the date hereof, with interest thereon [etc.] then this deed, as also a note of even date herewith, signed by me, whereby for value received, I promise to pay the grantee or order the said principal sum and interest at the times aforesaid, shall be void." There followed a covenant in these words: "And I hereby, for myself and my heirs and assigns, covenant with the holder or holders hereof to perform and observe each and all of the terms of the foregoing condition." In explanation of the meaning of the contract as affecting the personal liability of Jameson, evidence was introduced to show that he obtained no personal benefit from the transaction and that he was acting throughout solely in the interest of the trustor and the beneficiaries. There was also testimony of a contemporaneous understanding that Jameson was not to be held personally liable, but as this was contradicted by other testimony, and the finding is in favor of the plaintiff, we must disregard that testimony, even if we considered it competent.

This contract by its terms purports to make the defendant personally liable thereon, and neither the context nor the circumstances proven are sufficient to change its effect in ⁶¹⁰ that particular. It has been held that where a promissory note reading "we promise to pay," etc., is signed by the president of a company subscribing his own name, with the addition of the words "Prest. Pac. Peat Coal Co.," and by the secretary of the company, with the addition of the words "Sec. pro tem.," it is the note of the company, and not the personal obligation of the president and secretary; Farmers'

etc. *Bank v. Colby*, 64 Cal. 352, 28 Pac. 118. On the other hand, a note reading "we promise to pay," etc., and signed "D. Hassett, President," was held to be the personal liability of D. Hassett: *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320. The court in the latter case said: "There is nothing on the face of the note to show that there was any principal back of the defendant. He signed his own name, and wholly failed to indicate, if he had a principal, who or what the principal was. The word 'President,' which he added to his name, must be regarded as a mere *descriptio personae*." These cases perhaps sufficiently illustrate the rule applicable to contracts thus signed where the maker claims exemption from personal liability on the ground that he is an agent. If the facts in this cause brought it within the rule applied in *Farmers' etc. Bank v. Colby*, 64 Cal. 352, 28 Pac. 118, the defendant would be exonerated. But it is not a similar case. In the *Colby* case there was no question but that the president and secretary had power to bind the company by contract, and to that extent at least it is different from the case at bar. In the *Hassett* case the decision went upon the ground that the contract of Hassett did not purport to bind anyone but himself, and that, although he did not so intend, and was in fact acting for his principal, the contract could not be varied by parol evidence. This case is governed by the latter rule. The contract made by Jameson consists of two distinct and separate parts—the mortgage on the land, and the promise and covenant to pay the money, which latter purported to bind the trustee personally. The trust deed of Joy to Jameson gave the latter power only to mortgage the trust property. It gave no power whatever to make any promise or covenants to pay any money on behalf of Joy or on behalf of the beneficiaries. With respect to the mortgage, Jameson was acting solely as trustee, and could ⁶¹¹ not act otherwise, for he had no personal interest in, or power over, the land. With respect to the note and covenant, he was acting solely in his own behalf, for he had no authority thus to contract, except for himself. Where an agent makes a contract really on behalf of his principal, but which purports to be his promise and to bind himself alone, and he has not in fact any authority to make that particular contract for his principal, the general rule is that the agent will be personally bound by the contract, notwithstanding his

lack of personal interest in the consideration. He will be conclusively presumed to have intended to bind himself. This rule is particularly applicable where a trustee, in dealing with trust property, makes some personal promise to pay money in furtherance of the trust which he has no authority to make as trustee. In regard to such contracts he is a principal, and must be presumed to have intended to act for himself alone. The rule is thus stated by the supreme court of the United States in *Taylor v. Mayo*, 110 U. S. 330, 4 Sup. Ct. Rep. 147, 28 L. ed. 163: "When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is, therefore, the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by contracts he makes as trustee even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him. . . . If a trustee, contracting for the benefit of a trust, wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, and that the other party is to look solely to the trust estate." There is nothing in the note or mortgage of Jameson that can be construed as a stipulation relieving him from personal liability or requiring the lender to look to the mortgaged property alone as security. The reference in that part of the instrument operating as a conveyance, to the fact that Jameson was conveying as trustee, was properly inserted therein for the purpose of designating the source of the power by which he was assuming to hypothecate the trust property. It only indicates the character in which he acted and the power which he possessed in relation to the part of ⁶¹² the contract which constituted the mortgage, and it does not purport to qualify the direct covenant to pay contained in that instrument, nor the express promise contained in the note. The power to "mortgage" the property did not include power to make a personal promise on behalf of the beneficiaries or the trustor that they, or either of them, should pay the money. It carried power only to pledge, convey or hypothecate the property as security for money: Civ. Code, sec. 2920. The defendant's promise to pay the money was not necessary to the execution of the power,

and it must be considered as his own personal obligation, whereby he became surety for the payment of the money.

There is nothing in section 2267 of the Civil Code contrary to this conclusion. It is as follows: "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." This refers to the trust property alone. His acts respecting that property, if authorized by the terms of the trust, bind the property. He is to that extent an agent for the property and for the interested parties. Consequently, the mortgage of the trust estate in this case was valid; but nothing in this section, nor in the deed of trust, gave him an authority to bind the trustor or beneficiaries personally.

We are therefore of the opinion that the personal judgment against Jameson is supported by the evidence.

2. It is further claimed that the action is barred by the statute of limitations. The note and mortgage were executed in the state of Massachusetts, and, therefore, under subdivision 1 of section 339 of the Code of Civil Procedure, the action would be barred two years after the cause of action accrued. The action was begun on January 3, 1902. By the terms of the note it did not become due until June 8, 1900, which was less than two years before the action was begun. The mortgage provided that the sum borrowed should be paid in three years from its date, "with interest thereon, at the rate of five per centum per annum, payable semi-annually." It also contained the following provision: "But upon the default in the performance of any part of the foregoing ⁶¹³ conditions, the holder or holders hereof may sell the granted premises at public auction; such sale to be on or near the granted premises, or at the real estate exchange and auction board in the city of Boston, without notice or demand, except giving notice of the time and place of sale once in each of three successive weeks in any one newspaper published in said Newton, and may convey the same by proper deed or deeds to the purchaser. . . . And out of the proceeds of such sale or sales the holder or holders hereof shall be entitled to retain all sums then secured by this deed (whether then or thereafter payable), including all costs," etc. Default was made in the payment of the inter-

est due on December 8, 1898, and again on June 8, 1899. Thereupon on June 14, 1899, under the power aforesaid, the mortgagee sold the premises for the sum of two thousand dollars. This left a balance of twelve hundred and twenty-one dollars and sixty-eight cents remaining unpaid on the principal and interest on the note.

The argument is that, under the terms of the power of sale above set forth, it was necessary for the mortgagee to declare the principal and interest on the note and mortgage immediately due and payable, as a condition precedent to, or concurrent with, the exercise of the power of sale; that this election transformed the debt into a matured obligation, on which an action might have been maintained on June 14, 1899; that the statute of limitations began to run at that date, and hence that the action was barred two years thereafter. In support of this claim the defendant cites *Brickell v. Batchelder*, 62 Cal. 623, *Maddux v. Wyman*, 92 Cal. 674, 28 Pac. 838, and *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048. In none of these cases was there any question concerning the effect which the exercise of such a power of sale as the one here involved would have in accelerating the time of maturity of any balance on the debt remaining unpaid after the proceeds of the sale were applied thereon. The question in each case was concerning the right to foreclose for the entire debt, where the mortgage authorized a foreclosure suit upon a default in some minor condition, before the maturity of the entire debt. The cases are, therefore, not strictly in point, even if the instruments were alike. But they are not identical. There is a difference in the terms which is important and material. The case of *Brickell v. Batchelder*, 62 Cal. 623, is as strongly in favor of the defendant as any of the cases cited, and a comparison of the mortgage there construed with that here involved will serve to distinguish them all. In that case, the mortgage provided as follows: "But in case default shall be made in the payment of the said principal sum or the interest thereon, or any part thereof, . . . then said party of the second part, his heirs, executors, administrators or assigns, are hereby empowered to proceed to sell the premises above described, with all the appurtenances, *in the manner prescribed by law*. And out of the money proceeding from such sale, the party of the second part shall retain the above amount of thirty-six thousand dollars," with interest and costs and two per cent

for attorney's fees, which the instrument declared should become a debt to the mortgagee "upon filing the complaint in foreclosure." (The italics are ours.) The other cases are substantially the same in this respect. The provision in the mortgage here involved was that the mortgagee "may sell the granted premises at public auction," said sale to be "on the granted premises" or at the Boston real estate exchange, and "without notice or demand except" a three weeks' notice in a newspaper. The reason for holding that the mortgage in *Brickell v. Batchelder*, 62 Cal. 623, required a declaration making the entire debt immediately due, was that the provision authorizing the sale of the premises "in the manner prescribed by law" could not be construed otherwise than as requiring a sale upon execution issued upon a decree of foreclosure in an action for that purpose. This was said to be obvious from the fact that there was no other manner "prescribed by law" that could be applicable to such a case. And as this made a foreclosure suit necessary to the exercise of the supposed power, it necessarily, in the opinion of the court, implied that the mortgagee was given power to declare the entire debt fully matured, notwithstanding that, by the terms of the mortgage, the principal was not yet payable. It was assumed, although not stated, that an action of foreclosure could not be maintained, unless the entire debt was declared due. In the present case the terms of the mortgage imposed no such necessary implication and presented no such difficulty. The sale was not to be made by the sheriff as upon an execution sale, but at public auction on the premises, and by ⁶¹⁵ the mortgagee upon a notice specially prescribed in the power. No suit of foreclosure was required. The mortgagee could execute the power without judicial authority. It provided that the mortgagee should retain out of the proceeds of sale a sum sufficient to pay the note and interest. This implied that when the sale was made a part of the principal and interest on the debt equal to the proceeds which might be applicable thereto should thereupon be payable. But to say that a sum is payable is not the same as to say that it is due. A note made payable "on or before" a fixed date is payable at any time after it is executed; but it does not become due until the date is fixed. In the mortgage under consideration there is not a word to the effect that the debt shall become due upon the sale, nor to the effect that the mortgagee, as a condition

to the exercise of the power, must declare that it is due. The express language of the instrument is that it shall not become due until three years after its date. To interpolate a provision that it shall all become due upon a sale under the power, or that by such sale a greater part of the principal shall be immediately payable than the proceeds of the sale will pay, would be to put in the contract that to which the parties did not agree, and that which would contradict the express terms to which they did agree. By the contract, the payor of the note was to have the full term of the note within which to pay any deficiency remaining thereon, after the application of the proceeds of the sale. The mortgagee was given no power to deprive the payor of this advantage by any declaration he could make at the time of the sale. The effect of the sale and of the application of the proceeds was a mere payment upon the debt, a payment authorized to be made before its maturity, and of no more force in accelerating the maturity of the debt than any other payments authorized to be made upon a debt before it becomes actually due. It disposed of the mortgaged property in execution of the mortgage, and practically extinguished that part of the contract, leaving remaining the covenant to perform and the promise contained in the note, which remained in force to the extent of the balance remaining unpaid. These were separate obligations, and the suit is upon the note. No action could have been maintained for the balance due thereon until the expiration of three years from its date. ⁶¹⁶ It follows that the action was not barred by the statute of limitations.

The judgment and order are affirmed.

McFarland, J., Sloss, J., Lorigan, J., and Henshaw, J., concurred.

Rehearing denied.

A Note Payable to a Named Person, "Trustee," is not rendered non-negotiable by the use of the word "trustee," it being merely descriptio personae: *Central State Bank v. Spurlin*, 111 Iowa, 187, 82 Am. St. Rep. 511. And if an agent makes a note in his own name, he is not relieved from personal liability thereon by adding "agent" to his signature: *Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. Rep. 343.

A Note and the Mortgage given to secure it are usually construed together: *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598; *Kendall v. Selby*, 66 Neb. 60, 103 Am. St. Rep. 697; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620.

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McKANNAY v. HORTON.

[151 Cal. 711, 91 Pac. 598.]

MANDAMUS, Title to Office, When may be Tried upon.—The title to an office may be drawn in question and incidentally determined on an application for a writ of mandate, though such determination may not be conclusive as an adjudication or estoppel between the parties claiming the office. (p. 150.)

MANDAMUS, Trial of Title on Application for.—Where an application for mandamus is made to compel the issuing of a warrant to pay the salary of an officer, and two persons claim to be entitled to such salary and to be incumbents of the office, and their respective title and rights depend on who is the de facto mayor of a city, and the government of the city must come to a standstill if claims of public creditors cannot be paid, and many matters essential to the public welfare must be left uncared for unless some person is recognized as properly entitled to exercise the functions of mayor, the court is justified in proceeding with the hearing, though in so doing it must determine who is the de facto mayor. (p. 150.)

OFFICE, PUBLIC.—There cannot be Two De Facto Incumbents of the Same Office at the Same Time, and where two are acting simultaneously, each under a claim of right, that one alone will be recognized who appears to have the better title. (p. 151.)

OFFICE, PUBLIC, Loss of Title to by Conviction of a Felony. Both by the charter of the city of San Francisco and the provisions of the Political Code of California an office becomes vacant when the incumbent is convicted of a felony or an offense involving the violation of his official duties, and such conviction must be considered as complete when the verdict of guilty has been returned by the jury after the trial and a judgment has been entered thereon. (pp. 151, 152.)

PUBLIC OFFICE—Conviction of a Felony, Effect of Appeal upon Title to the Office.—If a public officer is convicted of a felony and sentenced upon such conviction, the effect of the judgment as terminating his title to the office is not avoided by his prosecuting an appeal and obtaining from the trial judge a certificate of probable cause. (pp. 153, 154.)

PUBLIC OFFICE, Removal from by the Appointment of Another.—If the secretary of a mayor holds his office only during the pleasure of the mayor appointing him, the appointment of a new secretary necessarily operates as the removal of the one previously appointed. (p. 155.)

William B. Kollmyer, for the petitioner.

Maurice L. Asher and William H. H. Hart, for the respondent.

712 BEATTY, C. J. This is a petition for a writ of mandate to compel the allowance of a claim for salary of the secretary of the mayor of San Francisco. There are two persons claiming to be mayor de jure of the city, and each is

assuming to act in that capacity. Each has appointed a secretary, both of whom have presented claims for salary for the month of July, 1907. The auditor cannot approve more than one claim, and, being uncertain which is valid, refuses to approve either. Practically, he takes the position of a stakeholder, willing to allow and certify the lawful claim as soon as it shall be determined which is lawful. Recognizing the difficulty of his position, the court in ordering the issuance of the alternative writ directed service to be made of a copy of the writ, together with a copy of the petition, upon John J. Boyle, the rival claimant to the office of secretary, and upon Eugene E. ⁷¹³ Schmitz, who was the de jure and acting mayor at the time of his appointment. Acting upon this suggestion, said Boyle has made himself a party to the proceeding by filing an answer to the petition, setting forth the facts upon which he founds his claim to be rightfully in the exercise of the duties of the disputed office. The cause has been submitted for decision upon demurrers to the answers of respondent and Boyle and upon facts stipulated by the parties where not admitted by the pleadings. The case is as follows:

At the general election in November, 1905, Eugene E. Schmitz was elected mayor of San Francisco for the next regular term of two years, and in pursuance of said election he duly qualified and entered upon the duties of the office on the eighth day of January, 1906. Thereafter he continued to discharge the duties of the office without question until July 9, 1907. (The fact that he was absent from the state on two occasions during this period, and that the president of the board of supervisors acted at such times as mayor pro tem., is not material in this case.) On the thirteenth day of June, 1907, in the superior court of San Francisco, said Eugene E. Schmitz was found guilty of a felony—the crime of extortion—by the verdict of a jury, and on July 8th he was sentenced by the judgment of the court to a term of imprisonment for five years in the state's prison at San Quentin. On the following day the judge of the superior court, presiding in the department in which the trial and conviction of said Schmitz took place, in obedience to the requirements of section 997 of the Political Code, caused to be delivered to the board of supervisors a formal notice of said trial, conviction, and judgment, together with a duly authenticated copy of the judgment as entered. On the same day (July 9, 1907) the

said board of supervisors regularly adopted a preamble reciting the election of Schmitz, his assumption of the office of mayor, his subsequent conviction of the crime of extortion, the judgment of conviction, and the fact that he was then actually confined in jail. They thereupon resolved that a vacancy existed in the office of mayor, and that they would proceed forthwith to elect a mayor to fill the vacancy for the unexpired term. Immediately after passing this resolution they did actually elect Charles Boxton as mayor for such unexpired term, who immediately qualified, and on the eleventh⁷¹⁴ day of July took possession of the rooms in the city hall which had been set apart by a resolution of the board of supervisors for the use of the mayor, and designated as the office of the mayor of San Francisco, together with the records and papers therein. On the ninth day of July he had appointed the petitioner to the office of secretary, who on the same day duly complied with all the legal conditions and requirements relating to the qualification of such appointees and entered upon the discharge of the duties of the office. On the sixteenth day of July, Boxton resigned the office of mayor, and on the same day Edward R. Taylor was elected by the board of supervisors to fill the vacancy for the balance of the unexpired term. He immediately qualified, and took possession of the office and records in the city hall, and has since continued to act as mayor, retaining the petitioner in his service as official secretary.

In the mean time Mr. Schmitz has never conceded that his conviction of a felony, or the judgment and sentence of imprisonment, as above stated, have occasioned any vacancy in the office of mayor, but, on the contrary, notwithstanding his confinement in the county jail in the custody of the sheriff, has been insisting on his continued right to the office, and actually discharging the duties of the office so far as under the circumstances he has been able to do so. Some of the city officials have continued to recognize his authority as the rightful mayor. Others, including the respondent, whose duty it is to act and whose authority to act depends in some instances upon written orders of the mayor, have refused to act unless upon concurrent orders from Schmitz and from Boxton or Taylor, and accordingly Schmitz has been certifying demands upon the city treasury. But Dr. Taylor, since he succeeded Mr. Boxton, has refused to act in conjunction with Mr. Schmitz in any official matter, and he alone is recog-

nized by the board of supervisors as the rightful incumbent of the office of mayor.

On the day of his sentence (July 8, 1907) Schmitz took and perfected an appeal to the district court of appeal for the first district—the proper court—and at the same time applied for and obtained from the judge of the superior court a certificate of probable cause for his appeal, which is still pending and undecided. Thereafter he continued and still ⁷¹⁵ continues to retain control of, and by his secretary, Boyle, remains in possession of, the office at Post and Franklin streets, which subsequent to the earthquake and fire, and down to the eleventh day of July, 1907, was the only office of the mayor of San Francisco. He also has in his possession the mayor's official seal.

The question we have to decide is, Who is entitled to the salary of secretary to the mayor for the last twenty-one days of July? But one salary can be paid, and that is claimed at the same time by McKannay, the appointee of Bixton, and by Boyle, the appointee of Schmitz. Each of the claimants has performed the duties of the office so far as he has been allowed to do so—Boyle in the service of Schmitz, and McKannay in the service of Bixton and Taylor. It is conceded to be the duty of the respondent to allow the claim and direct its payment out of the city treasury when duly certified by the mayor that it is correct. Taylor has certified that McKannay's claim for services from July 10th to July 31st is correct, and Schmitz has certified that Boyle's claim for a full month's salary is correct. The question therefore reduces itself to this: Who is mayor of San Francisco?

With reference to this question Mr. Boyle makes the preliminary objection that in this proceeding by mandamus we cannot try the title either of the secretary or mayor. We are not cited to any authority for the proposition that the title to an office cannot be tried—that is, inquired into—when it is incidentally involved in a proceeding which a third party has a right to institute. The doctrine which Mr. Boyle means to invoke is more correctly stated in these terms: Title to an office cannot be determined in mandamus where there is another specific remedy prescribed, or where there is another plain, speedy, and adequate remedy at law. This doctrine is very fully and learnedly discussed in *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398, where the subject—the rule, its reasons, and its limitations—are elaborately considered, and

where it is shown to be merely a rule of procedure, even in cases where it is sought to establish title to an office by a judgment which will operate as an estoppel in favor of a claimant and against an actual incumbent. Here, although we are obliged to decide for the purposes of this and like cases who is de facto mayor for San Francisco, we cannot determine by a ⁷¹⁰ judgment which will operate as an estoppel between Dr. Taylor and Mr. Schmitz who is the de jure mayor, however little doubt there may be as to the proper decision of that question. And as to the title of the secretary, we are not required to determine that. When we have once decided who is de facto mayor we shall have no difficulty in determining whose order the respondent must obey in the matter of allowing such claims against the treasury as must be allowed on presentation of the mayor's certificate that they are correct. This whole question as to the right to decide incidentally upon the title to an office in a proceeding by mandamus was fully and carefully considered in *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, and the result of the decision there is the same as in the case of *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398—viz., that the rule in such cases as the present is, as above stated, merely a rule of procedure—the rule, that is to say, of our statute, that the writ of mandamus will issue only in cases where there is not another plain, speedy, and adequate, or specially prescribed statutory, remedy: Code Civ. Proc., 1086. The rule is not jurisdictional, and its application to a particular case involves only the exercise of sound legal discretion. In *Morton v. Broderick*, 118 Cal. 447, 50 Pac. 644, it was held, as it must be held here upon even weightier considerations, that the gravity and urgency of the situation afforded ample ground for holding that there was no other remedy adequate or available to relieve the situation except mandamus, which was accordingly allowed notwithstanding the effect must be practically to end the dispute as to which of the two rival bodies was rightfully the board of supervisors of the city. The situation here is certainly as grave as it was then. The government of the city must come to a standstill if claims of public creditors cannot be paid, and many important matters essential to the public welfare must be left uncared for unless some person is recognized as properly entitled to exercise the varied and important functions pertaining to the office of mayor.

This preliminary objection being disposed of, we return to the question, Who is mayor of San Francisco? Dr. Taylor and Mr. Schmitz are each claiming to be at the same time the *de jure* and *de facto* mayor. It will appear from the facts above stated that each has some claim to be the *de facto* mayor. Dr. Taylor is in possession of the offices provided for ⁷¹⁷ the mayor by the board of supervisors—the governing body of the city and county—and is recognized by that board as the rightful mayor. Mr. Schmitz is in control, through his secretary, of the premises occupied by the mayor at the date of his conviction, but he himself is a prisoner in the county jail, where it is the duty of the sheriff to keep him closely confined. Nevertheless his right to act is maintained by some at least of the other city and county officers and by many private persons who resort to him for the purpose of transacting official business. He also is in possession of the official seal used by him up to the time of his conviction, while Dr. Taylor has been provided with a new seal. If these facts alone were considered, it might be difficult to decide which of the two is *de facto* mayor. But in such cases the law affords a rule of decision which in this case is not difficult of application. There cannot be two *de facto* incumbents of one office at the same time, and where two are acting simultaneously, each under claim of right, that one alone will be recognized who appears to have the better legal title: *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644. For the purpose, therefore, of determining who is mayor *de facto* of San Francisco, we must inquire who appears to be mayor *de jure*.

By the charter of the consolidated city and county it is provided that “An office becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony or of an offense involving a violation of his official duties,” etc.: Art. 16, sec. 10. And by section 996 of the Political Code it is provided that “An office becomes vacant on the happening of either of the following events before the expiration of the term: 1. The death of the incumbent. . . . 8. His conviction of a felony or of any offense involving a violation of his official duties.”

It will be seen that with respect to the case in hand the provisions of the charter and the state law are identical. Either in the absence of the other would give the same effect to any one of the enumerated contingencies, including conviction of a felony, that ensues in the case of the death of the

incumbent—that is to say, the office ipso facto becomes vacant: *People v. Fleming*, 100 Cal. 537, 38 Am. St. Rep. 310, 35 Pac. 163; *People v. Britc*, 55 Cal. 79.

⁷¹⁸ On the thirteenth day of June, 1907, the verdict of guilty in *People v. Schmitz* was returned and recorded, but we are not required to decide in this case that the entry of a verdict of guilty constitutes a “conviction” in the sense of the statute, for here a vacancy was not declared by the board of supervisors, and Boxton was not elected until the ninth day of July, after the entry of judgment on the 8th had been duly certified to the board. At that date certainly, if not before, Mr. Schmitz was convicted. The event had occurred which, by the terms of the statute and of the charter, vacated the office.

It is contended, however, that the perfecting of an appeal from the judgment and the granting of a certificate of probable cause by the trial judge prior to the election of Boxton and prior to the declaration of a vacancy in the office suspended the operation of the judgment for every purpose until the appeal, which is still pending, shall be finally determined. We are clearly of the opinion that the statute will not bear that construction. An office becomes vacant when the incumbent is convicted of a felony, and also it becomes vacant when he is convicted of any offense—whether felony or misdemeanor—if it involves a violation of his official duties. There are felonies which involve no violation of official duty; there are felonies, such as extortion by a public officer, which do involve a violation of official duty; and there are simple violations of official duty which are misdemeanors solely for that reason. Whether a felony does or does not involve a violation of official duty, the indictment will charge the facts constituting the felony, and a verdict of guilty will import a sentence of imprisonment in the state prison, to be executed at once unless a stay of proceedings pending an appeal is obtained through the medium of a certificate of probable cause, and even in that case the defendant is committed to custody in the county jail to await the result of his appeal, unless the court, in the exercise of a discretion rarely exercised, and only in exceptional cases, admits him to bail. The result is that a public officer convicted of a felony is placed by the verdict in a position and under a physical restraint which prevents him from performing the duties of his office. But if the misconduct alleged against a public officer is a misdemeanor only,

and only such because it is a violation of official duty, ⁷¹⁹ the proceeding against him is under the provisions of chapter 2 of part 2 of the Penal Code, sections 758-772. A verdict of guilty upon an accusation based upon the provisions of that chapter does not involve imprisonment of the defendant or any other penalty, except removal from office. It does not, in other words, disable the officer to discharge the duties of the office pending the appeal, and accordingly it is specially provided that in such cases he is not even suspended from office until thirty days after the entry of judgment, and not then if in the mean time he shall have taken an appeal and obtained a certificate of probable cause: Pen. Code, sec. 770. This special provision for an entire suspension of the operation of the judgment in an exceptional case shows what the rule is in all other cases, and the ground of the exception affords conclusive evidence of the meaning and motive of the rule. It means that since a prisoner in close custody cannot administer a public office, he cannot be allowed to stand in the way of the appointment of one who can perform its duties. No man has a property right in an office paramount to the public interest. He has a property right in the salary and emoluments of an office while he is capable of discharging and actually discharges its duties, but when by his fault or misfortune he is no longer able to render the service the public interests demand that he shall give way to some one who can. An official who is declared insane is simply unfortunate, but he ceases to be an official; an innocent man who is unjustly convicted of a felony is doubly unfortunate, but the fact that he may by means of an appeal ultimately succeed in establishing his innocence does not entitle him in the mean time to hold on to a public office which he is no more capable of serving than if he were insane. The law allows an appeal from a conviction of felony because, so far from being against the public interest, it is promotive of the public interest that a person accused of crime should have every reasonable opportunity of vindicating his innocence. But if a person so convicted is the incumbent of a public office, these considerations do not weigh in favor of retaining him in that position pending an appeal. The pendency of the appeal does not affect the presumption of guilt, which arises immediately upon the rendition of the verdict, and it would be strange indeed if in a state which gives such weight to that presumption as to deprive ⁷²⁰ the defendant of the right to bail, and to require

in all but rare and exceptional cases that he be detained in close custody in the common jail, the law should at the same time provide for his continuance in an office the duties of which he cannot discharge. There is no such law. The only effect of an appeal and certificate of probable cause is to stay the execution of the judgment. Removal from office is not part of the judgment of conviction in cases of felony, though a consequence which flows from it, and the statute in express terms defines and thereby limits the effect of the appeal and certificate of probable cause. "If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal": Pen. Code. sec. 1244. We are cited to a number of cases decided in other jurisdictions which are supposed to conflict with these views. We do not think there is any conflict or discordance except such as follows necessarily from different statutory provisions. On the other hand, there are numerous decisions by courts of the highest authority which fully sustain our conclusions. We do not consider it necessary to review these cases. We have only to construe our own statutes and the charter of San Francisco, the terms and policy of which are plain and identical, and there is no decision of this court which is in the least degree at variance with what is here held. The case of *People v. Treadwell*, 66 Cal. 400, 5 Pac. 686, comes as near as any other to support the contention of respondent, but it is distinguishable on several grounds. Treadwell, an attorney at law, was convicted of a misdemeanor in a justice's court and immediately appealed to, the superior court. There was no law making his conviction operate ipso facto to deprive him of his license. It was only the foundation for a new proceeding in the supreme court to revoke his license, involving the issuance of a citation to show cause why he should not be removed and a hearing upon the rule day. The justice of the peace, notwithstanding the appeal, forwarded to the supreme court a certified copy of his docket, and a citation was issued to Treadwell to show cause why he should not be removed. In response to the citation he alleged the pendency of his appeal. The court held, and properly held, that the proceeding under ⁷²¹ section 288 of the Code of Civil Procedure could not be instituted until the judgment became final. This is the rule generally in civil

cases, and the rule was held applicable to a proceeding to revoke a license to practice law, which is essentially a property right. An attorney at law is not a public officer. He does not as such discharge any public function. His license, like the license of a physician, a druggist, a dentist, or an architect, merely enables him to engage in his vocation for the service of private employers and for his private emolument. The public is not concerned in depriving him of the right to practice his profession in the service of those who choose to employ him until it has been finally determined that he is unfit for the profession. The decision in Treadwell's case was clearly right, but a loose and inaccurate expression occurs in the opinion which, if it were a correct statement of the law, might afford some support to respondent's contention. It is said—arguendo—that an appeal to the supreme court operates a suspension of the judgment of the lower court for all purposes. This, as every lawyer knows, is not true. If in a civil cause the appellant does not file a sufficient undertaking to stay proceedings upon the judgment, execution will issue notwithstanding the pendency of the appeal, and may be levied upon the property of the judgment debtor, and the property may be sold, and an indefeasible title vested in the purchaser at the execution sale, notwithstanding the result of the appeal, may be a complete and final reversal of the judgment of the trial court. And as in civil cases so in criminal cases—a judgment not final may be proved for every purpose for which it is effectual. It may be proved for the purpose of showing a vacancy in office, just as in a civil case, it may be proved to justify the levy of an execution, or to establish the title of the purchaser at the execution sale, and this even after it has been reversed on appeal.

The last objection urged by the respondent may be answered very briefly. He says the petitioner is not secretary to the mayor because it is conceded that Boyle was duly appointed to the place, and it does not appear that he has ever been removed. It would be a sufficient answer to this objection to say that the petitioner's claim is certified by the de facto mayor, but it may be added that in the case of the mayor's secretary, who holds the position only during the mayor's ⁷²² pleasure, he is removed whenever a new secretary is appointed and assumes the duties of the office.

It is ordered that the peremptory writ of mandate issue as prayed.

Shaw, J., Angellotti, J., Sloss, J., Henshaw, J., McFarland, J., and Lorigan, J., concurred.

ANGELLOTTI, J., Concurring. While I have concurred in the foregoing, I deem it proper to add that I am satisfied that the effect of the charter provision declaring that an office "becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony," etc., was to create a vacancy in the office of mayor upon the rendition and entry of the verdict of conviction against the then incumbent. One is "convicted" of a crime when a verdict of guilty has been so given and entered against him, or when a plea of guilty has been given and entered. This is the well-settled meaning of the term as ordinarily used in our constitutional and statutory provisions, and I can see no warrant for concluding that it was used in any other sense in the charter provision under discussion. Under this view, it is entirely immaterial whether or not judgment has been given upon the conviction, or whether or not the execution of any judgment so given has been stayed by an appeal. The vacancy in the office is in no way dependent upon any judgment given on the conviction, but was fully and finally created by the happening of the event specified—viz., the rendition and entry of the verdict of conviction.

There can, of course, be no question as to the power of the people of the city and county of San Francisco to make such provision in their charter as to purely municipal offices. As is shown in the opinion of the chief justice, the provision for the ouster of the incumbent in the contingency named is in no degree by way of punishment for any offense alleged to have been committed by him, but is solely for the purpose of securing an efficient, orderly, and decent discharge of the duties of the office, which doubtless it was deemed could not be had during the incumbency of one under a verdict of conviction of felony.

Sloss, J., and Shaw, J., concurred.

As to Whether Title to an Office can be Tried in Mandamus proceedings, see the note to State v. Gardner, 98 Am. St. Rep. 884; State v. Grant, 14 Wyo. 41, 116 Am. St. Rep. 982, and cases cited in the cross-reference note thereto.

One is "Convicted" who has pleaded guilty and been found guilty by a jury, although sentence has not been pronounced: Quintard v. Knoedler, 53 Conn. 485, 55 Am. Rep. 149. But see Blaufus v.

People, 69 N. Y. 107, 25 Am. Rep. 148. And a pardon granted after verdict and judgment, but pending appeal, is valid under a statute authorizing the governor to grant pardons "after conviction": State v. Alexander, 76 N. C. 231, 22 Am. Rep. 675; Commonwealth v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

CAUGHLIN v. CAMPBELL-SELL BAKING COMPANY.

[39 Colo. 148, 89 Pac. 83.]

NEGLIGENCE—Leaving Team in Public Street.—Leaving a very gentle team upon the public street restrained by a fifty-six pound weight connected by straps to the bridle-bits is not negligence per se, for which the owner of the team is liable for mischief done by the team in running away. The question whether such act is due care or negligence is for the jury to determine from all the facts and circumstances surrounding the transaction. (p. 160.)

APPEAL.—Findings of the Trial Court are entitled to the same consideration at the hands of the appellate court as the verdict of a jury. (p. 162.)

NEGLIGENCE—Leaving Horse in Street.—The owner of a gentle horse who leaves it standing in a public street, fastened as an ordinarily prudent man would fasten it in like circumstances, is not responsible for whatever injuries may occur if the horse breaks loose. (p. 163.)

NEGLIGENCE—Leaving Horse in Public Street.—A person who leaves his horse in a public street or highway must use ordinary care and prudence in fastening or restraining it so as to prevent injury. (pp. 163, 164.)

NEGLIGENCE—Ordinance as Evidence.—An ordinance imposing a penalty may be introduced in evidence, not for the purpose of creating or taking away a civil liability, but as bearing upon the issue of negligence. The jury may consider compliance with the ordinance as a circumstance tending to show due care, and a violation as tending to show negligence. (p. 164.)

T. H. Hardcastle, for the appellant.

J. Grozier, for the appellee.

149 CAMPBELL, J. The plaintiff Coughlin says he left his bicycle on Fifteenth street in the city of Denver leaning against **150** the adjacent curbstone. While the driver of defendant's wagon, to which two horses were attached, was engaged in making delivery of the products of its bakery, which business the defendant was conducting in the city of Denver,

the driver, negligently, as the complaint avers, left the wagon and team standing near plaintiff's vehicle without any person in charge or control thereof, by reason of which negligence the horses ran away, and with the wagon ran over plaintiff's bicycle and injured it, for which damages are sought by this action. The negligence of the defendant is denied in the answer. Upon these controverted issues the case was tried by the court without a jury. The findings were against the plaintiff, and judgment thereon was rendered dismissing the action. From this judgment the plaintiff took the case to the court of appeals.

For injuries of this character, the cause of action is negligence. Plaintiff in his complaint expressly grounded his action upon defendant's negligence in leaving the team and wagon in the street without any person in charge. From the admissions of the parties and specific findings of the court upon evidence which, though not altogether harmonious as to some minor particulars, as to important matters is not conflicting, it appears that defendant's driver has been employed for more than a year, and the team, though one of the horses was used only a short time, were very gentle and quiet, had traveled this same route every day, and had never been known to be frightened or to show evidence of viciousness. On the morning of the accident, after plaintiff left his bicycle on Fifteenth street, placing it in the ordinary way in which riders do, he went into Thompson's grocery store, and the defendant's driver with a team of horses drove up in front of the store, whether before or after plaintiff alighted from his bicycle the ¹⁵¹ witnesses do not agree, and stopped within two or three feet of the sidewalk, got off the wagon, put on the brakes, and let drop to the ground a weight, which was supposed to hold the horses, and then entered the store. While the driver was there the team started up for some reason which is not disclosed by the evidence, notwithstanding the precautions taken by the driver, and ran over and injured plaintiff's bicycle. The court found that the driver exercised reasonable care in what he did; that there was nothing unusual about the team; that he had a right to drive them where he did and leave them in the manner in which he did, and from all the facts the finding was that defendant was not guilty of the negligence charged.

The horses were not hitched to any permanent object, but were restrained or held in check by means of an iron weight.

To this piece of iron, weighing fifty-six pounds, which is carried in the wagon or hangs suspended therefrom when the horses are traveling, are attached two broad straps, one by which the weight is lifted from and dropped to the ground, and the other passes along under the tongue of the wagon to within four feet of the heads of the horses. Fastened to this broad strap at this point is a ring, and connected with this ring are two other straps, one running to the mouth of each horse and attached to the rings of the bridle bits on both sides of his mouth, so that when the weight is dropped from the wagon and the horses attempt to move the strap pulls upon the bits of the horses on both sides at the same time.

The appellant's position is that the act of defendant's driver, in leaving the team and wagon standing in the street as he did, was negligence per se, for which the defendant is liable in damages for any mischief that the horses may do. It is not the law ¹⁵² that the owner of a vehicle drawn by horses is absolutely liable for damages that they may do while they are being driven along, or left standing in, a public highway. The plaintiff unquestionably was lawfully on the street with his bicycle, and the evidence does not show that he was guilty of negligence that contributed to the injury. The defendant likewise was lawfully on the street with its horses and wagon. It is not true, however, as the plaintiff contends, that the mere act of leaving the horses and wagon on the street unattended is negligence per se, even if the fact that the horses got loose be some evidence of negligence. The latter point was so ruled in *Strup v. Edens*, 22 Wis. 432, though it was said that such a thing might occur notwithstanding due care in hitching.

The very cases cited by plaintiff show that where some restraint has been placed upon horses left standing in a street, the question whether such act is due care or negligence is for the jury to determine from all the facts and circumstances surrounding the transaction. Such was the case of *Rumsey v. Nelson*, 58 Vt. 590, 3 Atl. 484. There it was said that it might be considered as negligence in the fastening or leaving unattended of one horse that would not be so considered in another, and for that reason the character of the horse as being gentle or vicious is relevant.

In *Pearl v. Macauley*, 6 App. Div. 70, 39 N. Y. Supp. 472, which was an action for personal injuries which resulted from plaintiff's being knocked down and run over by defendant's

horse and wagon which had been left unattended in the street, the court instructed the jury that whether the act of the defendant was negligence for which he was responsible was for them to determine, and if the horse was not properly secured, defendant may be liable, otherwise not.

¹⁵³ The plaintiff seems to rely upon the doctrine announced in the leading case of *Fletcher v. Rylands*, 1 L. R. Ex. 265, affirmed by the house of lords in *Rylands v. Fletcher*, 3 H. L. Rep. 330. That was a case where the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on defendants' lands by defendants' orders and maintained by them. The ruling was that where a person lawfully brings on his land something which, though harmless while it remains there, will naturally do mischief if it escape out of his land, it is his absolute duty to keep it in at his peril. This case has been followed by some of the courts of this country, and rejected by others.

In his valuable work on the Law of Torts, fourth edition, at page 442, Mr. Pollock says that the judgment of that case itself suggests the possibility of exceptions, and that the tendency of later decisions has been rather to encourage the discovery of exceptions than otherwise. He further suggests that the policy of the law might have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk, instead of making him in such cases an absolute insurer, and says: "Yet no case has been found, not being closely similar in its facts, or within some previously recognized category, in which the unqualified rule of liability without proof of negligence has been enforced."

This court in the case of *G. B. & L. Ry. Co. v. Eagles*, 9 Colo. 544, 13 Pac. 696, cited the case, not, however, to the proposition asserted by this plaintiff, but in support of the doctrine that, in general, if a voluntary act, lawful in itself, may naturally and proximately result in the injury of another or the violation of his legal rights, the actor must at his peril see to it that such injury does not follow.

¹⁵⁴ In an elaborate opinion by Bissell, J., in *Bishop v. Brown*, 14 Colo. App. 535, 61 Pac. 50, cited with approval as to one point in *City of Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351, the learned judge discusses the case of *Rylands v. Fletcher*, 3 H. L. Rep. 330, and while not personally agreeing with the judgment therein, concedes it to be the law in

England, though not in accordance with the general American doctrine. He says that the Rylands case was cited by this court in the Eagles case (9 Colo. 544, 13 Pac. 696), to the proposition (which was one of the exceptions established by that very case), that wherever injury is done and results from the act of the defendant, and the injury is the natural and probable consequence of the act and ought to have been foreseen, there is a presumption of negligence, and the defendant may be held, though the plaintiff does not fully sustain the burden of establishing the negligence which is imposed upon him in another class of cases.

Whatever may be said of the unqualified doctrine of the English case, concerning which we express no opinion, it is not applicable to the case in hand. Here the defendant was lawfully on the highway with its team and wagon. While it is possible that an injury might be caused by leaving the team restrained as it was, we cannot say, either as a question of law or of fact, that it was the natural or probable result of such act that the team would break loose and cause mischief. All the cases upon this and analogous questions which we have been able to find decided by the courts of this country lay down the rule that the cause of action is based upon negligence, and negligence must be established by the plaintiff, or he cannot recover.

In addition to the cases already cited, *Belles v. Kellner*, 67 N. J. L. 255, 91 Am. St. Rep. 429, 51 Atl. 700, 54 Atl. 99, 57 L. R. A. 627, is a good illustration. Quoting from *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199, ¹⁵⁵ the court said: "The degree of care required of the plaintiff, or those in charge of his horse at the time of the injury, is that which would be exercised by a person of ordinary care and prudence under like circumstances. It cannot be said that the fact of leaving the horse unhitched is in itself negligence. Whether it is negligence to leave a horse unhitched must depend upon the disposition of the horse, whether he was under the observation and control of some person all the time, and many other circumstances, and is a question to be determined by the jury from the facts in each case."

The findings of the trial court are entitled to the same consideration at our hands as the verdict of a jury. It found that the fastening or restraining of the defendant's horses by means of the weight was a prudent and reasonable act of care upon its part, and we cannot say that the findings are

not supported by the evidence. Equally honest and intelligent men might differ as to whether leaving the team and wagon as the defendant did was the exercise of proper care or a negligent act. The court below was of the opinion that it was a proper degree of care, and we cannot interfere with that finding.

The plaintiff apparently places reliance upon an observation of Tindal, C. J., in *Illidge v. Goodwin*, 5 Car. & P. 190, which is cited and approved in *Colorado Mortgage Co. v. Rees*, 21 Colo. 435, 42 Pac. 42. That was a case where the plaintiff was injured by a horse which was attached to a cart and left standing in the street by the defendant without any person to watch them, and no attempt was made to hitch or in any way restrain the animal. The remark of the court was in answer to the suggestion of counsel for defendant that the horse was frightened by a third person passing and striking the same, and that the particular injury was caused by the bad management ¹⁵⁶ of plaintiff's shopman, who came out and laid hold of the horse's head. The learned chief justice said: "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done."

It must be borne in mind that this observation was made for the purpose of showing that though there may have been an intervening cause, yet if the injury would not have occurred but for the negligence of the defendant, the latter is nevertheless liable. To the same point the case was cited in the *Rees* case (21 Colo. 435, 42 Pac. 42). The facts in the *Illidge* case were that the defendant himself had said that the horse was given to backing, and it was very wrong for the man to leave it in the street. As applicable to the facts before the court and bearing on the question of intervening cause, the chief justice was right, but it is not the law in this country, and we apprehend it has never been the law in England, that the owner of a gentle horse who leaves it standing in a street, fastened as an ordinarily prudent man would fasten such an animal in like circumstances, is responsible in damages for whatever injuries may occur if the horse breaks loose.

In *City of Denver v. Utzler*, 38 Colo. 300, 120 Am. St. Rep. 108, 88 Pac. 143, 8 L. R. A., N. S., 77, the court in effect said that a person who leaves his horse in a public highway must use ordinary care and prudence in fastening or restraining the

same so as to prevent injuries. This accords with the doctrine we have declared in this case.

In behalf of the defendant was admitted in evidence an ordinance of the city of Denver which imposes a penalty upon any person who leaves any horse or other animal attached to a wagon in any street in the city without securely fastening such horse, or without the same being fastened by chain or strap to a weight or some other stationary object, ¹⁵⁷ the weight to be of metal, and weighing not less than fifteen pounds for a single horse, and twenty-five pounds for a team of horses. The plaintiff says that there was error in this ruling because an ordinance of the city cannot create or abrogate a civil duty enforceable at the common law. To this are cited, *Philadelphia R. R. Co. v. Ervin*, 89 Pa. 71, 33 Am. Rep. 726; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502. Such seems to be the rule, but the rule permits the introduction of an ordinance or statute of this character, not for the purpose of creating or taking away a civil liability, but as bearing upon the question of negligence. That is to say, the jury are entitled to consider compliance with an ordinance as a circumstance tending to show due care, and a violation as tending to show negligence. When this ordinance was admitted, the court said it might be considered for what it was worth. If it was considered at all, it must have been for the purpose above suggested, since the findings were in no wise based upon defendant's obedience to the ordinance, because the court was of opinion that defendant's restraint of the team was the exercise of the care which the civil law, not the ordinance, demands in cases of this kind.

Perceiving no error in the record, the judgment is affirmed.

Chief Justice Steele and Mr. Justice Gabbert concur.

A Person has no Right to Leave His Horse in a public street, unless it is securely fastened or in charge of some one competent to take care of it, and he is bound to take care that the horse does no injury in consequence of being frightened by anything that may occur: *Denver v. Utzler*, 38 Colo. 300, 120 Am. St. Rep. 108; *Damonte v. Patton*, 118 La. 530, 118 Am. St. Rep. 384, and cases cited in the cross-reference note thereto.

PEOPLE v. BURTON.

[39 Colo. 164, 88 Pac. 1063.]

ATTORNEYS AT LAW—Disbarment.—If an attorney at law convicted of a felony in another state is restored to his civil rights by pardon, the latter fact is not a defense to disbarment proceedings for the same offense, and the court may consider the conduct of the attorney, and if satisfied that it has been such as to require his disbarment, may disbar him. (p. 166.)

ATTORNEYS AT LAW—Disbarment—Denial of Guilt—Evidence.—If, in proceeding to disbar an attorney, the answer denies the allegations of the information that he has been guilty of gross or other professional misconduct, admits that he was tried and convicted as charged, avers that he was not guilty, did not receive a fair trial, and that because of his innocence and improper conviction he was granted a full and free pardon, a motion for judgment on the pleadings will be overruled and the respondent be allowed to offer proof in his defense. (p. 166.)

S. S. Large, for the petitioner.

Morrison & De Soto and R. Talbot, for the respondent.

¹⁶⁵ **STEELE, C. J.** The respondent was admitted to practice in this state as an attorney at law on March 9, 1896, and the information states that he has been guilty of gross professional malconduct in that, under an indictment charging him with felony, to wit, grand larceny, he was, on the eighteenth day of September, 1903, tried, convicted and sentenced in the superior court for criminal business at Boston, in the state of Massachusetts.

The defendant, in his answer, denies that he has been guilty of gross or other professional malconduct, as charged in the information, or at all; admits that he was tried, convicted and sentenced, as charged in the information, but he avers that he was not guilty of the charge laid in the indictment; that he did not receive a fair or impartial trial thereon; and further states that, by reason of representations truthfully made to the then governor of Massachusetts, and by reason of the fact that it was manifest that he was innocent of any offense, and had been wrongfully convicted, the said governor of Massachusetts did, on the 25th of May, 1904, issue to respondent a full and free pardon.

Petitioner has moved for judgment upon the pleadings.

We have held, in the case of *People v. Webber*, 26 Colo. 229, 57 Pac. 1079, that "Pardon, or the payment of a fine, or service of sentence, may restore one to his civil rights—may

blot out the offense committed—but it cannot wipe out the act of which he was adjudged guilty, and it is the act that the court considers in these disbarment proceedings.” And that “any misconduct of an attorney which would render his continuance in practice incompatible with the proper respect of the court for itself, or a proper regard for ¹⁶⁶ the integrity of the profession, is sufficient to cause his disbarment.”

So that the fact that the respondent has been restored to his civil rights by the pardon of the governor of Massachusetts is not a defense, and the court may consider the conduct of the attorney, and, if satisfied that his conduct has been such as to require his disbarment, may disbar him. But the question which is here presented has not been decided by this court, and we are not prepared, at this time, to determine whether, in this character of proceeding, a judgment of conviction is conclusive evidence of the guilt of a respondent, or is simply prima facie evidence. In view of the statements in the answer that he is not guilty of any professional misconduct, that he did not have a fair and impartial trial, and that, because of his innocence and improper conviction, the governor of Massachusetts granted him a full and free pardon, we have concluded to reserve the determination of the question concerning the effect of the record of conviction, and to permit the respondent to offer proof in defense of the charge preferred. The motion for judgment upon the pleadings will be denied.

Decision en banc, all the justices concurring.

On Grounds for the Disbarment of Attorneys, see the notes to *In re Philbrook*, 45 Am. St. Rep. 71; *In re Thresher*, 114 Am. St. Rep. 839. An attorney should be disbarred whenever he ceases to have a good, moral character: *People v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206; *People v. Macauley*, 230 Ill. 208, 120 Am. St. Rep. 287.

RICHARDS v. SANDERSON.

[39 Colo. 270, 89 Pac. 769.]

PUBLIC LANDS—Right to Graze Stock upon.—There is an implied license that the public lands shall be free to the people who seek to use them for the purpose of grazing stock, so long as the government does not forbid such use. (p. 169.)

PUBLIC LANDS—Grazing Stock upon.—The privilege of grazing stock upon the public lands cannot be monopolized by anyone directly or indirectly, or under claim that he is but protecting his own land. (p. 169.)

ANIMALS—Unfenced Private Lands—Right to Keep Off Trespassing Animals.—A person has the right to drive the cattle of another from the unfenced land of the former, exercising that degree of care to prevent injury thereto that would ordinarily be observed by a prudent person, but when the cattle cross the line of the land of such owner onto land belonging to the government, the right to drive them further ceases. (p. 169.)

ANIMALS—Trespassing—Uninclosed Lands.—The principle of law derived from England, that the owner must prevent his stock from going upon the uninclosed land of his neighbor, is not applicable to the vast regions of the public domain which have long been open to the use of stock-raisers. (pp. 169, 170.)

PUBLIC LANDS—Stock-grazing Privileges—Usual Range.—In an action to recover for the wrongful driving of cattle from their usual range on government land, if it is undisputed that the vicinity from which they were driven was their usual range, it is not necessary to instruct the jury as to the quantum of proof which is required to establish the fact that the cattle had been willfully driven from their usual range, nor is it necessary in such case to define the word "range" when it is undisputed that the government lands from which they were driven was their usual range. (p. 170.)

PUBLIC LANDS—Stock-grazing Privileges—Driving from Usual Range.—Under a statute providing that if any person shall maliciously drive cattle from their usual range he shall be deemed guilty of a misdemeanor and shall be liable to the party injured in three times the amount of the actual injury occasioned by the commission of the offense, it is not necessary to establish a cause of action that the cattle be driven beyond the limits of the territory within which they may naturally range. Willful driving to any material extent from public domain within such territory to another locality, within or without such territory, is a driving from their usual range. (p. 171.)

ANIMALS—Grazing Privileges—Uninclosed Lands.—One who turns his cattle out to graze, unrestrained, upon lands where he has a right to turn them, knowing that they will probably wander on the uninclosed lands of another, is under no obligation to prevent them from entering upon such premises, and if they do so enter through following their natural instincts, he is not responsible for the damages occasioned thereby. (p. 172.)

ACTIONS.—Advice of Counsel does not bar an action, nor is it any defense to one for actual damages caused by a wrongful act, but is limited to mitigation of vindictive damages. (p. 173.)

ANIMALS—Maliciously Driving Cattle from Usual Range.—Under a statute providing that if any person shall “maliciously” drive cattle from their usual range he shall be deemed guilty of a misdemeanor and liable in triple damages, the word “maliciously” means a wrongful act done intentionally, without just cause or excuse. (p. 173.)

APPEAL—Admission of Evidence.—A party cannot successfully complain on appeal of the admission or rejection of evidence which tends to prove an act that he himself admits he committed. (p. 174.)

DAMAGES—Verdict—Computation.—If a statute allows the successful party to recover a sum which is determined by multiplying the actual damages sustained a specified number of times, it is immaterial whether the jury return in their verdict the sum which the plaintiff is entitled to recover by virtue of the statute, or whether they return the actual damages, and the court directs the judgment to be entered in accordance with the statute. (p. 174.)

VERDICT.—Affidavits of Jurors cannot be Received to impeach their verdict. (p. 175.)

Richardson & Hawkins, for the appellants.

Ward & Ward, for the appellees.

273 GABBERT, J. Appellee, as plaintiff, brought an action against appellants, as defendants, to recover damages resulting from the wrongful driving of cattle belonging to the plaintiff. There was judgment for plaintiff, from which the defendants appeal.

It appears from the pleadings and testimony that the parties to this action each owned, or had leased in severalty, several thousand acres of land. For the most part these lands were alternate sections, the intervening sections being government land. The major part of the lands of plaintiff were north of Bijou creek, while the greater part of the lands of defendants were south of this stream. The lands of both parties were adjacent to each other except as separated by that belonging to the government; or, perhaps, more accurately speaking, were in the same general territory, with the principal holdings divided by Bijou creek, the different tracts of each being mostly separated by intervening alternate sections belonging to the government. Both parties were engaged in the business of keeping and raising cattle upon their respective lands and upon those adjacent, belonging to the United States. With a few exceptions which will be noted later, none **274** of these lands were fenced, and the cattle of plaintiff ranged over the entire territory within which the lands of the parties are situate, and in so doing grazed upon lands belonging to the defendants. The usual summer range

of plaintiff's cattle was in a section of country south of Bijou creek, known as "Six Shooter Gulch." The testimony establishes beyond dispute, in fact, it is admitted by the defendants, that in the spring, summer and early autumn of 1901 they drove the cattle of the plaintiff from this locality off their lands, and, incidentally, over and across intervening government land, and beyond the territory within which these lands are included, for the purpose of preserving the herbage and grass upon their own lands.

The important question presented at the outset is, whether the defendants had the right to do so, it being contended on their behalf that they had, provided that in driving the cattle of plaintiff, reasonable care was exercised to prevent injury to them. An instruction to this effect was requested on behalf of the defendants, and refused. There was no error in this refusal. There is an implied license that the public lands of the United States shall be free to the people who seek to use them for the purpose of grazing stock, so long as the government does not forbid such use. To protect this use, Congress, in 1885, passed an act the purpose of which was to prevent parties from monopolizing any part of the public domain: *The Josefa Segunda*, 23 U. S. 321, 6 L. ed. 332. Our state laws bearing on the subject indicate the same policy. The privilege of grazing stock upon the public lands cannot be monopolized by anyone, directly or indirectly, or under claim that he is but protecting his own lands: *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. Rep. 305, 33 L. ed. 618; *Taylor v. Buford*, 8 Utah, 113, 29 Pac. 880; *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

²⁷⁵ The defendants had the right to drive the cattle of plaintiff from their own lands, exercising that degree of care to prevent injury thereto that would ordinarily be observed by a prudent person, but when the cattle crossed the line of the land of the defendants onto land belonging to the government, the right to drive them further ceased. In the government land, the rights of both parties were the same; the plaintiff had the right to have his cattle graze upon these lands in common with others who chose to exercise the same right. They constituted part of the usual summer range of his cattle. The defendants, under the claim that it was necessary in order to prevent the cattle returning to graze upon their lands, could not drive them from lands which they were lawfully upon. The principle of law derived from England,

that the owner must prevent his stock from going upon the uninclosed lands of his neighbor, is not applicable to the vast regions of the public domain which have been open to the use of stock-raisers for more than a century: *Morris v. Fraker*, 5 Colo. 425; *Willard v. Mathesus*, 7 Colo. 76, 1 Pac. 690; *Nuckolls v. Gaut*, 12 Colo. 361, 21 Pac. 41; *Pace v. Potter*, 85 Tex. 473, 22 S. W. 300.

And hence, the law does not recognize that the owner of uninclosed lands has any right to prevent such use of the public domain under claim that thereby he is protecting his own land. Were the law otherwise, ownership of a piece of land would enable the owner, under the guise of a right to prevent cattle grazing upon his land, to practically control a large area by driving such a distance as would be necessary to prevent their return to his land.

The complaint consisted of two counts—the first, under the common law, for negligently, wrongfully and maliciously driving the cattle of the plaintiff; the second, under the statute, which provides, in ²⁷⁶ effect, that if any person shall maliciously drive cattle from their usual range, he shall be deemed guilty of a misdemeanor, and shall be liable to the party injured by such action in three times the amount of the actual injury occasioned by the commission of the offense: 1 Mills' Ann. Stats., secs. 1424, 1425.

The jury returned a verdict under the second count, and we will now consider the errors assigned on the refusal of the court to give other instructions requested. An instruction was refused to the effect that the statutes above referred to were highly penal in their nature, and that before the plaintiff could recover under these statutes, it was necessary for him to clearly prove that the defendants had actually violated the terms thereof. Whether or not this instruction correctly stated the law, as a general proposition, is not involved in this case. The defendants admitted that they had, or had caused, the cattle of the plaintiff to be willfully driven. It is undisputed that the vicinity from which they were driven was their usual range, and had been used and occupied by the plaintiffs for the purpose of keeping and raising cattle for more than twenty years; so that it was not necessary to instruct the jury, whatever might be the rule ordinarily, as to the quantum of proof which was required on the part of the plaintiff to establish the fact that the de-

defendants had willfully driven his cattle from their usual range.

Error is also assigned upon the refusal of the court to give an instruction defining the meaning of the word "range." In the circumstances of this case, there was no error in such refusal, for the reason, as above stated, that the testimony is undisputed that the government lands from which the cattle of plaintiff were driven by the defendants, was the usual range of such cattle. It is urged the testimony discloses that the range of plaintiff's cattle ²⁷⁷ was over a territory much greater than the vicinity from which they were driven; and by certain instructions requested, it was sought to advise the jury that no damages could be recovered under the statute for driving from one part of the range to another. Cattle unrestrained will range over a large scope of country. Where they formerly ranged, the condition of grass and water, the season of the year, and storms, will cause cattle following their natural tendency to roam more or less; but it is not necessary, in order to establish a cause of action under the statutes, that they be driven beyond the limits of the territory within which they may naturally range. Willful driving to any material extent from public domain within such territory to another locality, within or without such territory, is driving from their usual range.

An instruction was also requested to the effect that lands which are the subject of private ownership do not constitute a cattle range within the meaning of the law against the expressed will of the owner. We do not see how the refusal of this instruction could have in any manner prejudiced the defendants. There was no claim on the part of the plaintiff that he had the right to pasture his cattle on lands belonging to the defendants.

There was requested on the part of the defendants an instruction to the effect that they would not be liable to the plaintiff for driving his cattle off their private lands, if they did so without any unnecessary injury to such cattle. This was probably a correct statement of the law, but it appears from the instructions given that this proposition was clearly covered.

There were a number of other instructions requested and refused, which we do not deem it necessary to notice in detail. They are either disposed ²⁷⁸ of contrary to the contention of counsel for defendants by the views already ex-

pressed, or in the disposition of errors assigned to instructions given, or did not embrace issues in the case, were covered by those given, were incorrect in part, or the consideration thereof is not necessary because, by the verdict, the issues tendered by the first count were eliminated. Further, it might be said that the only real issue in the case, according to the undisputed facts, was the amount of the damage suffered by the plaintiff, and the action of the court in refusing the other instructions tendered was not prejudicial to the defendants on this proposition.

The defendants filed a cross-complaint by which they claimed they had been damaged through the plaintiff willfully and repeatedly turning his cattle upon their lands. The court withdrew from the consideration of the jury the claim for damages, as alleged in this cross-complaint. This was not error, because there was no testimony to sustain its averments. The plaintiff drove, upon lands belonging to himself, a number of his own cattle. These lands adjoined those of the defendants. The lands of both were within the same general inclosure, but there was no fence, or other barrier, between them, and the cattle wandered upon the lands of the defendants and depastured the same. This was not sufficient to establish a cause of action in favor of the defendants and against the plaintiff, because it was not tantamount to a willful driving of his cattle upon the lands of the defendants. One who turns his cattle out to graze, unrestrained, upon lands where he has a right to turn them, knowing that they will probably wander on the uninclosed premises of another, is under no obligation to prevent them entering upon such premises, and if they do so enter through following their natural instincts, he is not ²⁷⁹ responsible for the damages occasioned thereby: *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093. This proposition is clearly applicable to the case of one who does no more than turn his cattle upon the public domain to graze, even though he knows that, following their natural instincts, they may wander upon the uninclosed lands of his neighbor. The plaintiff did turn his cattle upon public domain, in the near vicinity of lands belonging to the defendants. One-half of the territory from which they were driven either belonged to the plaintiff or was government land. The other half belonged to the defendants. The plaintiff may have had good reason to believe that his cattle would wander upon the lands

of the defendants. This would be natural for the cattle to do. The lands embracing the public domain and that of the defendants were alternate sections covering a large area. He had a right to place them on the public domain or his own land; was under no obligation to restrain them from going upon the lands of the defendants; and therefore he would not be responsible to the latter if they did. Such a case is entirely different from those cited by counsel for defendants, where it appears that the owner of stock willfully pastured it upon lands belonging to another, either by driving or herding thereon.

In *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977, 68 Pac. 206, it was held that where stock is driven intentionally and persistently upon the uninclosed lands of another against his will, a trespass occurs for which he may recover.

In *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. Rep. 477, 38 L. ed. 363, it was held that if the owner of land stock it with a greater number of cattle than it could properly support, so that, in order to obtain a proper amount of grass, they would be forced to stray upon the adjoining ²⁸⁰ uninclosed lands of another, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance.

The case at bar does not fall within the rule announced in either of these cases. There was no testimony which justified the submission of any such questions to the jury.

Error is assigned upon the action of the court in striking from instructions tendered on behalf of the defendants parts thereof, and as thus modified, given, to the effect that it was proper for the jury to consider whether or not the defendants, before driving the cattle of plaintiff, in good faith took legal advice and were governed thereby in what they did. This is not an action to recover exemplary, but for actual damages only. True, under the second count judgment is demanded for the penalty allowed by the statute, but this penalty can only be determined by the actual damages sustained. Advice of counsel does not bar an action, nor is it any defense to one for actual damages caused by a wrongful act, but is limited to mitigation of vindictive damages sought to be recovered: *Cochran v. Tuttle*, 75 Ill. 361.

Error is also predicated upon an instruction by which the jury were advised that the term "maliciously," as used in

the statute upon which the second count is based, did not necessarily mean ill-will toward the plaintiff, and that if it appeared from the evidence that the defendants willfully drove the cattle of plaintiff off public domain, which was their usual range, that they might infer that such driving was done maliciously. Maliciously, as used in the statute, means a wrongful act done intentionally, without just cause or excuse; and so, if the defendants willfully drove the cattle of plaintiff off such portion of the public domain as was their usual ²⁸¹ range, without right so to do, such act was malicious, within the meaning of the law.

Other instructions given are also challenged, which it is not necessary to take up in detail, as the questions raised are disposed of in passing upon those considered.

Error is assigned on the rulings of the court on the reception and rejection of testimony. The two main questions in the case were, first, the driving of plaintiff's cattle from their usual range by defendants; and, second, the damage to plaintiff as the result of such driving. The defendants admitted the driving, and even if the court erred in admitting or rejecting testimony tending to prove that defendants did drive the cattle, it was not prejudicial. A party cannot successfully complain of the admission or rejection of testimony which tends to prove an act that he himself admits he committed. With respect to the second proposition, we do not think the court committed prejudicial error in the reception or exclusion of testimony bearing on the subject of damages.

The final error assigned relates to the judgment. The jury returned a verdict under the second count, assessing the damages of plaintiff at the sum of five hundred and fifty dollars. On this verdict the court rendered a judgment for sixteen hundred and fifty dollars—three times the amount of the damages assessed. Where a statute allows the successful party to recover a sum which is determined by multiplying the actual damages sustained a specified number of times, it is immaterial whether the jury return in their verdict the sum which the plaintiff is entitled to recover by virtue of the statute, or whether they return the actual damages, and the court directs the judgment to be entered in accordance with the statute. It must be certain, however, that the jury returned a verdict for the actual damages ²⁸² only, before the court would be authorized to render a judgment for the penalty. We think it clearly appears from the instructions in

this case, that the jury returned a verdict for the actual damages which they found the plaintiff had sustained. It is true, that in stating the issues, the statute was referred to, and that in a subsequent instruction it appears the jury were advised that if the cause of action under the statute was established, the defendants would be liable to the plaintiff in three times the amount of the actual damages; but it nowhere appears that the jury were advised they could treble the damages. On the contrary, in another instruction they were told that if they found for the plaintiff under the second count, they should assess such damages as were actually suffered by him.

On the motion for a new trial, an affidavit of a juror was introduced which stated, in effect, that it was not the intention of the jury to find for the plaintiff under the second count, but under the first. It is well settled that the affidavit of a juror cannot be received to impeach a verdict.

The judgment of the district court is affirmed.

Chief Justice Steele and Mr. Justice Campbell concur.

The Liability of Owners of Livestock Herded or permitted to range on the uninclosed land of another is discussed in the note to *Monroe v. Cannon*, 81 Am. St. Rep. 446. The vacant public lands are public commons, free to the use of all citizens alike. But persons who have the right to graze their livestock on public lands have no right to willfully and knowingly direct or drive their stock upon private lands, although they are uninclosed and contain the most available water supply: *Healy v. Smith*, 14 Wyo. 263, 116 Am. St. Rep. 1004; *Bell v. Gonzales*, 35 Colo. 138, 117 Am. St. Rep. 179.

MOSCA TOWN COMPANY v. WELLINGTON.

[39 Colo. 326, 89 Pac. 783.]

APPEAL—Nonprejudicial Rulings.—If a motion to make an answer more definite and certain is overruled, and there is no restriction as to the admission of evidence under the issues as framed, and the appellant is not prejudiced by the action of the court, the ruling will be sustained on appeal. (p. 176.)

FIXTURES—Buildings.—A building erected to effectuate the purpose for which land is conveyed, for permanent use, and upon a substantial rock foundation, becomes a fixture and part of the realty. (p. 177.)

ESTOPPEL—Judgment—Inconsistent Position.—If land is conveyed with reversion upon the grantee ceasing to operate a tannery thereon, and a third person sells him lumber on credit which is used

in a tannery building erected on the land, and afterward obtains a judgment against him for the price of the lumber, such third person cannot, upon the tannery ceasing to operate, claim a right to the building or to the material used therein, under an agreement with such grantee before the judgment that he should have the building in settlement of his claim. (p. 178.)

FIXTURES—Right to Remove.—If land is conveyed to be used for a specified purpose, with reversion upon the grantee ceasing to use it for that purpose, and a building is erected thereon for permanent use to effectuate such purpose, such building becomes a fixture, and cannot be removed by an assignee of such grantee after the property has ceased to be used for the intended purpose. (p. 178.)

FIXTURES—Buildings—Right to Remove.—If land is conveyed to be used for a specified purpose with reversion upon the grantee ceasing to use it for that purpose, and a building is erected thereon by the grantee for permanent use to effectuate such purpose, such building becomes a fixture, and the grantor has a right, after the property has ceased to be used for the purpose specified, to take possession, tear down the building, and remove the material, as against any claim therefor by an assignee of the grantee. (p. 179.)

W. E. Cox, for the appellant.

J. W. Shields, for the appellees.

327 CASWELL, J. Appellant, a corporation and plaintiff below, brought suit in the district court of Costilla county to recover the value of certain lumber and other items of personal property described in the complaint. The appellee Wellington filed an answer. The trial was had in the district court, a jury being waived. A motion was made to make the answer more definite and certain, which was overruled, and the action of the judge in overruling same is assigned for error. The case was tried to the court and there seems to have been no restrictions as to the admission of evidence under the issues as framed, and it further appears that the appellant was not prejudiced by the action of the judge in denying the motion, and the ruling is therefore sustained.

One of the main questions in this controversy is whether the appellant owned, and was entitled to the possession of, certain lumber, nails, and other personal property described in the complaint, at the ³²⁸ time the appellee caused the same to be taken from its possession, she claiming to own it. It appears from the record that in March, 1897, appellant conveyed to the Mosca Labor Exchange, Branch 151, Costilla county, state of Colorado, a certain tract of land, which conveyance contained, amongst other things, a condition that should the grantee fail to autonomously exist, or to contin-

nously operate on said land a tannery, the deed should thereupon become null and void, and the title to said premises should thereupon revert to the grantor and to its successor or successors in interest. Thereafter the grantee erected a building for a tannery upon the land. This building was erected to effectuate the purpose for which the land was conveyed, and for permanent use. It was built upon a substantial rock foundation. Under the ruling in this jurisdiction it became a fixture and part of the realty: *Roseville etc. Co. v. Iowa Co.*, 15 Colo. 29, 22 Am. St. Rep. 373, 24 Pac. 290; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744. The tannery was operated as such by the grantee named in the deed for about sixty days, when the business was closed down, and no other or further business was done at any time by the grantee, the Labor Exchange of Costilla county, nor does it appear that there was ever any meeting of the members of the exchange thereafter. Some time after the discontinuance of the business of the exchange, a Mr. Terry, as agent, and as an officer of the appellant company, entered upon the land described in the deed and, by reason of the reversion clause, took possession of the premises, including the building, and posted notices upon every door of the building, which notices had been posted for months before the removal of the building by appellant, and thereafter maintained exclusive possession. About February, 1901, the appellant caused the building to be taken down and the material removed ³²⁰ to Mr. Terry's yard, where it was held as the property of the appellant company, from which place it was taken about the fourth day of March, 1901, by appellee.

Of the defendants, Mrs. Wellington is the only one who defended in this suit. It appears from the testimony of herself and husband that at the time of the erection of the tannery building, she sold the Labor Exchange a bill of lumber amounting to about one hundred and seventy-five dollars (\$175); the lumber was delivered and used in the construction of the building; at that time they expected to join the organization, but neither she nor her husband did so; that they were paid a small amount on account of the lumber, and thereafter procured a judgment against the exchange for one hundred and fifty-eight dollars (\$158), which, on the fourth day of March, 1901, had not been paid. There is testimony by the appellee to the effect that before the judgment was obtained, some members of the association

gave her the building in settlement of her claim, and also that there was talk of a compromise in settlement of the judgment, she to take the building therefor, if she could have time to move it off the lots, but that she did not take the building in settlement of her judgment, because she could not make arrangements with Mr. Terry to move it. She based her right to take the lumber from appellant upon this agreement with some members of the exchange that she should have the building in settlement of her claim or her judgment. The testimony is contradictory and inconsistent. She cannot have the building in settlement of her claim, and then have a judgment based upon the same claim and upon evidence that the exchange still owed her the amount. She must rely upon the one or the other, and, as she obtained a judgment, it seems of necessity that she must rely upon that. It ³³⁰ does not at all appear how or at what time she obtained any title to the building or to the lumber by virtue of any agreement with the Labor Exchange association. It appears, by the testimony of a member of this association, that there were about fifteen or sixteen members. It appears from the evidence of appellee that she talked with three members concerning the taking of this building, and they told her to take it. It is not shown that they had any right to dispose of or convey the property of the exchange. It appears further from the testimony of her husband, who seemed to have been acting for her in this matter, that a sufficient number of members would not meet so as to make up a quorum, and no action by the exchange as such was ever taken in connection with the material. We do not see how such action could be taken otherwise than by executing a deed for the land and the building to appellee. The record discloses no claim by appellee to the land, nor is it attempted to be shown that she succeeded to the rights of the exchange under the condition of the deed. It is one of the conditions which seems to have been made a part of the purchase price that the premises should be occupied by the grantee named therein, and by it alone. The land seems by the deed to have been conveyed for no further consideration than that it should be occupied by the Labor Exchange, which obligated itself to conduct a tannery business. The appellee then had no title to the building or to the lumber with which it was constructed, in whole or in part.

The court found that it was necessary that some proceedings should be taken by appellant to have the reversion declared, by the judgment of a court, before it could claim any title to the property under the reversion; and it is claimed by the appellee that either a judgment, or decree, or a deed from the ³⁸¹ grantee was required to reinstate the appellant in its rights to the property. We are not favored with any authorities upon this question, and do not pass upon it, because it is not necessary to the disposition of this case. It is sufficient to say that "a reversion is the residue of an estate left in the grantor and his heirs to commence in possession after the determination of some particular estate granted out by him": 24 Am. & Eng. Ency. of Law, 420, and many cases cited. It is further true, however, that a reversioner may waive a condition, and that the breach does not of itself determine the grantee's estate without some act on the part of the person entitled to take advantage of the forfeiture; but the undisputed evidence shows that appellant took such steps as would give notice of its claim of forfeiture. As before stated, its agent made an entry or re-entry upon the premises, posted notices, maintained the exclusive possession and kept people away from them; and this possession was taken by reason of the reversion clause; and the possession was claimed for both the building and the land. Whether any further steps were required is a matter which has nothing to do with the appellee, and from which she can have no advantage. Under the record presented the Labor Exchange alone, as grantee, can question the method of the appellant in enforcing the forfeiture; it is not a party to the suit, and is not here complaining.

There is no question about the right of the Mosca Town Company to convey the limited fee in the first instance, and no question about the right of the grantee to accept the deed containing the condition and to make the character of contract it did make. When the building was taken down and the materials removed, there were no rights in the appellee which could attach to them. It follows, then, that the action of herself and her agents and employes ³⁸² in the removal of the property described in the deed from the possession of appellant was without any authority of law whatever. The title which it had obtained by taking possession of the land and building and maintaining the possession of the building,

both as real property and personal property, was superior to any right or title of appellee.

The judgment is reversed.

Chief Justice Steele and Mr. Justice Maxwell concur.

The Criterion of a Fixture is the united application of these requisites: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appurtenant; and 3. The intention of the party making the annexation to make a permanent accession to the freehold: *Filley v. Christopher*, 39 Wash. 22, 109 Am. St. Rep. 853, and see the cases cited in the cross-reference note thereto. A building resting by its own weight on flat stones laid upon the surface of the ground is held not a fixture in *Carlin v. Bitter*, 68 Md. 478, 6 Am. St. Rep. 467.

MALONEY v. FLORENCE AND CRIPPLE CREEK RAILROAD COMPANY.

[39 Colo. 384, 89 Pac. 649.]

MASTER AND SERVANT—Safe Place in Which to Work.—The duty imposed upon the master to furnish his servant a safe place in which to work applies only when the place is permanent in its character, and has been prepared or selected by the master himself, or by others upon whom have devolved the discharge of the master's obligation in this respect, and such duty is not imposed where the servant is engaged in making a place safe that is known to be dangerous, or putting an insecure place in condition for the resumption of use. (p. 182.)

MASTER AND SERVANT—Safe Place in Which to Work—Assumption of Risks.—If railroad employes are engaged in the night-time in removing a landslide from a railroad track, and while so engaged some of them are killed by a large rock falling upon them, they necessarily assume the incidental risks of the employment in which they are engaged, and the doctrine of a safe place in which to work has no application. (p. 183.)

MASTER AND SERVANT—Safe Place—Assumption of Risks—Negligence of Fellow-servant.—Railroad employes engaged in the night-time in removing a landslide from a railroad track assume the risk of the employment they are engaged in, and if the section foreman or the roadmaster is negligent in representing the place to be safe, it is the negligence of a fellow-servant, for which the railroad company is not liable. (p. 185.)

C. D. Bradley and J. H. Maupin, for the appellants.

H. M. Blackmer, K. C. Scuyler and W. F. Scuyler, for the appellee.

386 GODDARD, J. These cases were originally brought by the appellants respectively. The facts being the same in

each, they were by consent consolidated for trial. The facts are substantially as follows:

The Florence and Cripple Creek Railroad Company owns and operates a railway between the towns of Florence and Cripple Creek. A considerable portion of the road is built through a rough, mountainous country, necessitating frequent cuts along the mountain-side. In the early afternoon of the 11th of April, 1901, a landslide came down from the mountain-side of a cut about thirty feet in height and nearly perpendicular, at a point on the road about two miles north of the station of Adelaide, covering the track in what is known as a "thorough cut" for fifty feet in length, and to the depth of six or eight feet, with rock and earth, completely obstructing the passage of trains. John McGrath, who was foreman of the section upon which this slide occurred, with one man, commenced preparation for removing the fallen rock and earth. About 4 P. M. a conductor of a south-bound freight train, which was stopped by the obstruction, went to Adelaide and telegraphed information of the occurrence to some managing officer. About 5 P. M. Miles McGrath, roadmaster and superintendent of bridges upon defendant's road, then at Florence, in pursuance of an order of the trainmaster of the road, prepared a work train consisting of flat cars and started to the place of the slide, gathering up on the way all the employés of the road, among them Timothy J. Maloney and Jackson P. Allen, who were foremen on other sections. This train arrived at the place of the obstruction about 8 P. M. The cars were pushed up to ⁸⁸⁷ the rock and earth lying in the cut. It was then quite dark, and the only light available was furnished by lanterns and such light as reached the north end of the cut from the headlight of the freight engine, which, by reason of a curve in the track, did not reach the south side of the cut, and by a small bonfire, which lasted but a few minutes.

After the arrival of Miles McGrath no inspection of the mountain-side of the cut from which the slide came was made. The conductor of the freight train, when he met Miles McGrath at Adelaide, stated to him that, from what he observed while at the place, he was of the opinion that there was danger of rock falling at the cut. The attention of John McGrath, foreman of the section, and who was in charge of the work, while it was still daylight, was called by Harris, a brakeman on the freight train, to a crevice at

the side of the rock on the mountain-side, who expressed the opinion that it was dangerous.

During the afternoon, John McGrath warned two men not to go through the cut because it was dangerous. Upon arriving at the obstruction, several of the foremen went to Miles McGrath, and one of them, in the presence of the others, asked him if the place had been examined and was all right, whereupon John McGrath, who was also present, said in their hearing to Miles McGrath, "Yes, I examined it before dark, and it is all right." Upon hearing that statement, the foremen with their men, including Maloney and Allen, went to work loading the fallen rock upon the cars and the work continued until about 9 o'clock P. M., when a large rock fell from the mountain at the south side of the cut, killing Maloney and Allen and some others.

The appellants, who are the widows of the deceased, seek to recover damages which they allege they have sustained by the death of their respective ~~388~~ husbands, which they aver was caused by the negligence of the company by not ascertaining by proper inspection the dangerous condition of the premises; and in failing to prop and support the cliff of rock, or rock wall, so as to prevent the same from falling; and in not advising said Maloney and Allen of the dangerous condition of the work; and in not furnishing sufficient light to enable them to observe the safe, or unsafe, condition of the place; and in failing to provide a safe place in which to work.

Upon the conclusion of the plaintiffs' testimony the court, on motion, directed verdicts in favor of defendant, and upon the return of said verdicts the court entered judgment dismissing said causes, and for costs against plaintiffs. From this judgment plaintiffs prosecute an appeal.

The rule that imposes upon an employer the duty to furnish a reasonably safe place for his employes to work in is not applicable to the facts in this case. This duty is imposed and enforced when the place is permanent in its character, and has been prepared or selected by the master himself, or by others upon whom have devolved the discharge of the master's obligation in this respect; but does not apply where the servant is engaged in making a place safe that is known to be dangerous, or putting an insecure place in condition for the resumption of labor or use. In such case, the danger is necessarily incident to the work itself, and depends

upon constantly changing conditions, and can only be guarded against by the care of the servants engaged in its performance.

In the case of *Florence & C. C. R. Co. v. Whipps*, recently decided in the circuit court of appeals, 138 Fed. 13, 70 C. C. A. 443, ³⁸⁹ which involved the responsibility of this appellee for the death of one Whipps, who, while engaged in the same service, was killed at the same time, and under the same circumstances, and by the falling of the same rock, that killed Maloney and Allen, Judge Lochren, who delivered the opinion of the court, in distinguishing that case from those in which the rule as to "safe place" applies, used the following language:

"In many cases of preparatory work to fit a place for its intended use, like the excavation along a mountain-side of a cut for a railroad track, the work so prosecuted will make the place which was safe before dangerous to the servants, as their work progresses, from the liability of stone or earth to slide down the sides of the cut so made by the same servants, who must be held to have assumed all such risks; . . . and in the removal of debris after some catastrophe or accident which has made the place unsafe and unfit for the use to which it has been devoted, and where the very object of the work is to clear away the wreckage and restore the place to a condition of safety and usefulness. If by such catastrophe a railroad used for the transportation of passengers, freight and mails is obstructed, the removal of the obstruction is a necessity admitting of no delay, whether the exigency arises in the daytime or at night; and servants employed, who undertake and engage in such work, necessarily assume the incidental risks: *Gulf etc. Ry. v. Jackson*, 65 Fed. 48, 12 C. C. A. 507; *Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344; *Porter v. Silver Creek etc. Coal Co.*, 84 Wis. 418, 54 N. W. 1019; *Colorado Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Carlson v. Oregon Short Line Ry. Co.*, 21 Or. 450, 28 Pac. 497. The fact that the exigency causes the work to be done in the darkness of night and with insufficient lights does not ³⁹⁰ lessen the assumption of the risks of the servants: *Gulf etc. Ry. v. Jackson*, 65 Fed. 48, 12 C. C. A. 507. . . . The defendant was not responsible for the catastrophe and wreckage which caused whatever danger there was in the situation, and under such circumstances the doctrine of 'safe place' had no application."

The same rule is announced in *City of Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351, and in *Colorado C. & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251.

The company, therefore, was not remiss in the performance of any duty in failing to furnish a safe place for the deceased to work in, and it is equally clear that under the existing conditions it would have been impracticable to prop or support the embankment so as to prevent the rock from falling. It only remains, therefore, to consider whether, in the circumstances of this case, the appellee was delinquent in the performance of any other duty it owed to the deceased.

Counsel for appellants insist that it was incumbent upon appellee to have made a careful and diligent examination of the premises before the men were permitted to work therein. There is no evidence as to what inspection, if any, was made by John McGrath, the foreman of the section, during the afternoon; or what disclosure, if any, as to the result ascertained by such examination, or as to the condition of the premises, was made to the deceased. It does, however, appear that, in response to an inquiry by some one of the foremen, John McGrath stated to Miles McGrath in the presence and hearing of some of the men that he had examined it before dark, and it was all right. It was apparent to all, including the deceased, that no inspection other than that made by John McGrath, or some one employed with them in the common work, had been made, and with this ³⁹¹ knowledge they entered upon the work. If he was negligent in his examination, it was the negligence of a fellow-servant, of which they cannot complain, and the deceased had no right to assume that any inspection other than that by a fellow-servant had been made.

Judge Lochren, in the opinion above referred to, in discussing this phase of the case, said:

“Here all the servants, including the foremen and the roadmaster, were, when the disaster happened, engaged in the common work and enterprise of keeping the railway in proper condition for the passage of trains. The disaster caused an instant sudden emergency in the very work in which they were engaged. An emergency admitting of no delay—not even for daylight—certainly not for the summoning of the managing officers of the railway or of its engineers. The work to be done was simply the rough work of

clearing the tracks of the fallen rocks, which the servants, under their foremen and roadmaster, were entirely competent to perform. The circumstances and conditions must have made it plain to all that no inspection or precaution respecting the cliff was or could have been had except by such of the servants as were there while it was daylight. Under these circumstances the servants who came later, as well as those who were there in daylight, assumed the risk of the employment they engaged in; and if John McGrath or Miles McGrath were negligent in representing the place to be safe, that was negligence of fellow-servants: *Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. Rep. 683, 48 L. ed. 1006; *Pennsylvania Co. v. Fishack*, 123 Fed. 465, 59 C. C. A. 269."

Upon a careful consideration of all the facts disclosed by the record, we think the court below properly ³⁹² directed a verdict in favor of appellee. The judgment is therefore affirmed.

Chief Justice Steele and Mr. Justice Bailey concur.

The Duty of an Employer to Furnish a Safe Place for his employes to work, and the assumption of risks by them when such place is not furnished, are discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 557.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

ANDREWS CO. v. NATIONAL BANK OF COLUMBUS.

[129 Ga. 53, 58 S. E. 633.]

CORPORATION—Liability on Note Given by President.—Where the president of a corporation obtains money from a bank, giving therefor a note signed by himself individually, and pledging as collateral security stock owned by him in the corporation, the note is his individual debt, although the money is obtained for the use of the corporation, and is placed to its credit on the books of the bank. (p. 189.)

CORPORATION.—A Pledgee of Corporate Stock may invoke equitable relief against the corporation to prevent it and other parties from consummating a fraudulent sale and transfer of the assets of the company, whereby the pledged stock will be rendered worthless. (p. 193.)

Charlton E. Battle and Goetchius & Chappell, for the plaintiffs in error.

J. H. Martin, A. W. Cozart and John H. Lewis, for the defendants in error.

54 BECK, J. The National Bank of Columbus filed an equitable petition against the defendants, Andrews Co., a corporation, Ernest Andrews, Lane, Bagley, and others, as individuals, seeking to obtain judgment against them on certain promissory notes; and against these and other defendants, Schuessler and Roberts, to have an alleged fraudulent sale of the assets of the Andrews Co. to the last two named defendants set aside, and to have a receiver appointed to take charge of the assets of said company; and praying also that Ernest Andrews, Schuessler, and Roberts be required to account for all sales of goods belonging to said Andrews Co., made by them since the date of the alleged fraudulent transfer to said Schuessler and Roberts. The material allegations of the petition are as follows: That about the twenty-seventh

day of August, 1900, Ernest Andrews, president of the Andrews Co., obtained from petitioner the sum of \$2,500, as a loan; he "asked the officers of petitioner to take his individual note for this sum, but petitioner states that, although said note was taken from said Ernest Andrews individually, the same represented a debt of the Andrews Co." In September, 1900, said Andrews obtained from petitioner an additional loan of \$2,500, "and petitioner avers that, although the said Ernest Andrews gave his individual note for the said last-mentioned sum, the same was also a debt of the said Andrews Co." In both of these instances the notes given to plaintiff were under seal, and signed by Ernest Andrews individually; and in each case he "deposited with petitioner \$10,000 of the capital stock of said Andrews Co., which had been issued to him, as collateral security" for said loans. Again, in August, 1902, Ernest Andrews applied to petitioner for an additional loan of \$5,000; but "petitioner already held the notes of the said Ernest Andrews for \$5,000, as above stated, and was unwilling to take his note for any additional amounts, and he (Andrews) then stated to petitioner that the money was for the Andrews Co., but that he did ⁵⁵ not want to increase its indebtedness, and that he would therefore procure the notes of certain employés of the corporation," to wit, Lane, Bagley, and three others, "for the sum of \$1,000 each, which notes would be indorsed by him, and that he would deposit, as security therefor, stock in the Andrews Co. to the amount of \$5,000, which had been issued to said parties." In pursuance of this agreement, petitioner advanced \$5,000, and took the notes of said employés, Lane, Bagley, and others, each of said parties giving forty-four notes for the sum of \$25, and one note for the sum of \$24. All of said notes were under seal, and signed by said parties individually, and indorsed by Ernest Andrews; and \$5,000 of stock in the Andrews Co., which had been issued to said parties, \$1,000 each, was deposited as collateral security for said notes. In May, 1903, said Andrews represented to petitioner that the assets of the Andrews Co. amounted to \$57,000, and that the liabilities were about \$24,000, but that \$10,000 of this indebtedness was due to W. T. Roberts, one of the directors of the Andrews Co., and that Roberts was willing to take \$10,000 of preferred stock in said company in settlement of said debt, "the said Andrews stating at the time that the company would increase

its capital stock to \$40,000, including said preferred stock, and that the only effect of said preferred stock would be to entitle the holder thereof to an eight per cent dividend before any dividends or profits were paid to the other stockholders." And petitioner thereupon surrendered the certificates of stock held by it as collateral, and other certificates were delivered to it in lieu of those surrendered, the new certificates being marked "Common," and the stock of said company was increased to \$40,000. Subsequently Andrews paid petitioner \$500 on the notes signed by him, and petitioner surrendered \$2,000 of the stock held by it as collateral, leaving \$23,000 of the stock in the Andrews Co. in the hands of petitioner as security for the balance due on said notes. In the summer of 1903, Ernest Andrews entered into negotiations with certain creditors who held claims against the Andrews Co. for merchandise, and sought and obtained a settlement of about \$10,000 of the indebtedness of the company for about \$5,000 or \$6,000, which amount was paid out of the money of the Andrews Co. Petitioner alleges that the total indebtedness of the firm for merchandise was about \$16,000, and that, after the settlement above referred to, only \$6,000 remained ⁵⁶ unpaid. "Yet the said Ernest Andrews, for the purpose of holding said indebtedness against the assets of said corporation, and of defrauding petitioner, procured the creditors holding said claims to transfer and assign the same to B. A. Schuessler, a sister of said Andrews, intending thereby that the said Schuessler should hold said claims for the full amount of the face thereof against said Andrews Co." In November, 1903, all of said defendants "combined and confederated for the purpose of defeating petitioner in the collection of its debts, by depreciating and utterly destroying the value of the securities held by it; and in pursuance of said confederation the said Ernest Andrews and the Andrews Co. made a pretended sale of all the stock of goods and other assets of the Andrews Co. to the said Schuessler and Roberts; no money was paid by said parties in said purchase, but it was agreed between them that the purchase price thereof should be the \$10,000 of settled accounts which were held by the said Schuessler, and the \$10,000 of preferred stock in said company held by said Roberts, and the assumption of the \$6,000 of unsettled indebtedness against said Andrews Co. Petitioner avers that the \$10,000 of preferred stock held by said Roberts did

not entitle him to any priority in the distribution of the capital or assets of said corporation, but only to a dividend of eight per cent upon stock before any dividends or profits were paid to the other stockholders"; that the value of the assets of the company was about \$44,000, "and that there was really no consideration for said sale, except the assumption of the \$6,000 of the indebtedness of said corporation." And "petitioner further shows that by said pretended sale the said Ernest Andrews and the other stockholders of said company, well knowing that your petitioner held said \$23,000 of stock in said company as collateral security, and that the same would be thereby rendered worthless, and intending thereby to destroy the security held by petitioner and to defeat petitioner in the collection of its just debt, prevented the said Andrews Co. from continuing its said business, although the same has been since conducted by the said Ernest Andrews in the same manner as before, as hereinbefore stated," viz., in the name of Schuessler and Roberts. The insolvency of Ernest Andrews, Lane, Bagley, and the other signers of the notes is also alleged. The plaintiff amended its petition by amplifying the allegations of ⁵⁷ fraud. The defendants filed demurrers on various grounds—among others, that the petition is multifarious, and that there is a misjoinder of parties defendant. The court overruled each of the demurrers, and the defendants excepted.

1. When all of the allegations in the petition, relative to the creation of the debt represented by the notes attached to the petition, are considered together, no doubt remains that the debt is one from Ernest Andrews, Lane, and the other makers of the notes, individually, and not the debt of the Andrews Co., the corporation, to the bank. This conclusion is not to be affected by the general recitals that the debt was one of the Andrews Co., and that the money obtained, which was the consideration of the notes, was for the use and benefit of the Andrews Co., and was placed to the credit of that company on the books of the bank. There are facts alleged in the petition of more weight and significance than these mere general allegations. In the first place, the bank took the notes of Ernest Andrews, Lane, and the other stockholders individually, and these notes are under seal. And again, the shares of stock of the corporation were deposited as collateral security for the payment, not of the debt of the company to the bank, but for the payment of these

notes. And in one paragraph of the petition it distinctly appears that after the ⁵⁸ notes of Ernest Andrews, to the amount of \$5,000, had been taken, and additional funds were needed, the bank "was unwilling to take his [Ernest Andrews'] notes for any additional amount; and he then stated to your petitioner that the money was for the Andrews Co., but that he did not want to increase its indebtedness, and that he would therefore procure the notes of certain employes of the corporation, to wit, Lane, Bagley, and others, for the sum of \$1,000 each, which notes would be indorsed by him, and that he would deposit as security therefor stock in the Andrews Co. to the amount of \$5,000, which had been issued to said parties." Here again it appears that the notes of Lane, Bagley and others were taken under seal, signed by them, individually, and that these notes were taken because the bank was unwilling to take Ernest Andrews' note "for any additional amounts," and that "he did not want to increase [the corporation's] indebtedness." The authorities cited by the plaintiffs in error upon the point now under consideration contain nothing contrary to the conclusion which we have reached. In the case of *Merchants' Bank v. Central Bank*, 1 Kelly, 418, 44 Am. Dec. 665, it was said that "It may be stated generally, that where it appears on the face of the paper that the credit is not given to the agent, and the name of the principal is disclosed at the time of the transaction, and the act is within the powers of the agent, the principal is bound. The question whether the agent is bound does not affect this question, for there are many cases where both principal and agent are bound. Now, it is apparent on this bill of exchange [the paper sued on] that it was the intent of the parties to bind Scott Cray's principal; else why make it payable to him as agent, and why take his indorsement as agent? It is still more manifest that he does appear to act as agent. The testimony upon the trial, too, is that the name of his principal was disclosed to the Central Bank at the time the bill was discounted." If this excerpt from the opinion in the case last cited is not sufficient to show an entirely different state of facts from those set forth in the case at bar, the reading of the entire case will make the difference clear and distinct.

It is unnecessary to discuss the cases cited by the plaintiffs in error in detail. The case last above referred to, and the case of *Third National Bank's Appeal*, 141 Pa. 214, 21 Atl.

598, 12 L. R. A. 223, seems to be most confidently ⁵⁹ relied upon by counsel. The latter case lays down merely the broad ruling that a loan of money to a corporation will render it liable for the debt, although the note of an individual instead of the note of the corporation was taken therefor, because supposed to be better security. In the case at bar, we hold as a matter of law, under the allegations in the petition, that the loan of money was not to the corporation but to the individuals. The other cases cited in the brief of counsel for the plaintiffs in error are easily distinguishable from the instant case. And while we do not put our ruling, upon the question immediately under consideration, upon the fact that the notes given by Ernest Andrews, Lane, and others were under seal, it is not to be concluded that we regard that feature of the case as unimportant. In the case of *Merchants' Bank v. Central Bank*, 1 Kelly, 418, 44 Am. Dec. 665, it is said: "The inference drawn from the paper is, that Scott Cray acted as agent for some person, or corporation; but who, or what, does not appear. The name of his principal does not appear. The general rule is this: in order to bind a principal, on a contract made by an agent, it must purport, on its face, to be the contract of the principal; and his name must be inserted in it. It is not enough that the agent be described as such in the instrument: Story on Agency, sec. 147; Paley on Agency, by Lloyd, 180-182; 2 Kent, 3d ed., 629. This rule applies, more particularly, to solemn instruments under seal; and as to them, to use the language of Judge Story, it is 'regularly true,' but not universally true in all its extent. For, so far as regards instruments under seal, there are some exceptions to some of the requirements of the rule. Although the rule is thus strict as to sealed instruments, yet a more liberal rule obtains as to unsolemn instruments, especially commercial and maritime contracts": See, also, *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S. E. 582, and authorities there cited.

2. Having reached the conclusion that the debt represented by the notes was the individual debt of the signers of these notes, we have now to decide whether the payee and holder of those notes, who was the pledgee of a majority of the shares of stock of the Andrews Co., was in a position to invoke the equitable relief against the corporation to prevent it and other parties from consummating a fraudulent sale and transfer of the assets of the corporation, whereby the

stock pledged would be rendered valueless. ⁶⁰ Reference to the statement of facts will make it appear how this sale and transfer was to be effected. That the transaction between the corporation on the one side, and Schuessler and Roberts on the other, was not only tainted, but saturated with fraud, is undeniable if the allegations of the petition are true; and they are to be so taken as against the demurrer. It is not necessary for us to decide what might have been the rights and remedies of the petitioner had it been a stockholder of the Andrews Co., or had it been a creditor of the same. Had it been a stockholder, owning a majority of the shares of stock, and having a voice in the control and direction of the affairs of the corporation, it might possibly have been compelled to resort to a different procedure more peculiarly adapted to the righting of the wrong about to be inflicted upon a stockholder by an unauthorized act of the corporation, tending to impair and destroy the value of his shares of stock. Or, if the bank had been a creditor of the corporation, it might not have been able to proceed against the corporation, or the parties to whom the corporation made a pretended sale of all its assets, until after its claim was reduced to judgment, unless it was proceeding under the provisions of the Civil Code, section 2716, and had put itself in a position to invoke the remedies provided thereby. But it is neither a creditor nor a stockholder in the full sense of that word. In both the briefs for plaintiffs and defendant in error it is considered as a pledgee of stock, holding the shares of stock as collateral security for the payment of a debt. And it is as bearing this relation to the corporation, the validity of whose acts are attacked, that we are to treat it, and to decide whether or not it is entitled to the aid of a court of equity in setting aside a sale alleged to be fraudulent, and charged to have been the result of a combination and conspiracy "for the purpose of defeating petitioner in the collection of its debts by depreciating and utterly destroying the value of the securities held by it."

Counsel for plaintiffs in error contend that if it appears that petitioner is neither a stockholder nor a creditor of the Andrews Co., it must follow that it is not entitled to maintain the present action. But as we view it, the fact of its being neither a stockholder nor a creditor of the corporation removes all doubt as to its right to equitable relief at this time. Had it been a stockholder, it might, as we have said,

have had some voice in the control and ⁶¹ direction of the affairs of the corporation; had it been a creditor, it might have reduced its claim to judgment, and proceeded against the purchasers under the fraudulent sale of the assets of the corporation; but being merely a pledgee of the stock, holding debts against individual stockholders, it cannot have adequate relief except in an action of this nature against the corporation, the stockholders, and the parties who "combined and confederated" with them to depreciate and destroy the value of the stock pledged. Any kind of a proceeding at common law would have required a multiplicity of suits and a circuitry of action. "Pledgee of stock has the right to maintain an action for the preservation of the assets of the company": 22 Am. & Eng. Ency. of Law, 2d ed., 907; 10 Cyc. 648. "Pledgees of shares of stock have such interest in the corporation as to entitle them to object to the act of their pledgors in turning property of the corporation over to another stockholder in payment of shares of stock": *St. Louis Stoneware Co. v. Partridge*, 8 Mo. App. 580; 12 Cent. Dig., par. 573 (e). This doctrine is applied by the supreme court of Minnesota in the case of *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, where it is said: "The holders of the stock, whether holding as general owners or as pledgees, are therefore interested in the preservation of the corporate property, and in preventing it from passing out of the hands of the corporation. Stockholders do not have an 'interest' in the corporate real estate, in the sense in which the word 'interest' is commonly used in that connection; for such real estate is the property of the corporation. For this reason we think that the court below has used the word 'interest' in this finding inaccurately. But this is not important. Upon the facts found, and the preceding conclusions of law, the plaintiffs, as holders of the stock, are interested in the preservation of the corporate property, and in preventing it from passing out of the hands of the corporation. If this is so, they have a right to take legal means to preserve the property, to prevent it from being lost to the corporation, or its value from being impaired. . . . It is also contended by the defendant's counsel that the plaintiffs have no standing in court, because a stockholder, as such, could not sustain an action of this kind. It is an answer to this to say that, as remarked by the counsel in another part of his brief, the plaintiffs, though they hold the stock, are

not stockholders, but pledgees ⁶² merely, and therefore they cannot exercise the control over the association which stockholders can. What the stockholders may compel the association to do, they cannot compel it to do. They cannot, therefore, be required to act through the association, but may bring an action on their own account, and in their own names, to protect their rights and interests as pledgees."

If we have stated the correct doctrine as to the right of pledgees of stock in cases like that stated in this petition, the court did not err in overruling the demurrers of any of the defendants, which were general in their nature; though it must follow as a matter of course, from what we have said in this opinion, that the plaintiff is not entitled to a judgment upon its notes against the Andrews Co., and so much of the prayer of the petition as seeks this particular relief against the corporation must be unavailing, however righteous the other demands in the petition may be.

3. But the mere fact that a part of the remedy and relief sought is not appropriate does not have the effect to render the bill multifarious. Nor was there a misjoinder of parties. The corporation whose assets were transferred by the fraudulent sale resulting from a wrongful "combination and conspiracy," its stockholders, and the other parties to the alleged pretended and wrongful sale were all proper parties. And especially W. T. Roberts and Mrs. Schuessler should have been joined as parties defendant; and if they have so misappropriated and wasted any of the assets obtained by the alleged wrongful sale, the petitioner would be entitled to an accounting as against them. The respective rights of Mrs. Schuessler and Roberts as creditors of the corporation, and of Roberts as a creditor or holder of preferred stock, if he be one, and of petitioners may be all adjusted according to the priorities of their claims upon the final winding up of the business of the corporation, and the distribution of its assets.

Judgment affirmed.

All the justices concur.

RIGHTS, REMEDIES AND LIABILITIES OF PLEDGEES OF CORPORATE STOCK.

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I. Rights of Pledgee of Stock.

a. To Protect Assets of Corporation.—A pledgee of corporate stock has such an interest therein as entitles him to be heard in a court of equity concerning the preservation and protection of the assets and property of the corporation. His rights in this respect would seem to be essentially the same as those of the owner of stock, for a loss of corporate assets must result in a depreciation of the value of the stock and a consequent impairment of his security: *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851; *St. Louis S. Co. v. Partridge*, 8 Mo. App. 580; *Gorman-Wright Co. v. Wright*, 134 Fed. 363, 67 C. C. A. 345. He has, however, no greater rights than the pledgor has, or would have had if he had not parted with the stock: *Erny v. G. W. Schmidt Co.*, 197 Pa. 475, 47 Atl. 877; *City of Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 62 Pac. 141.

A pledgee of stock may sue in equity to obtain relief against the misappropriation of the funds and assets of the corporation by the officers in charge: *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851; or to restrain one not a stockholder from so controlling the affairs of the company as to impair the value of its assets: *Chafee v. Quidnick*, 14 R. I. 75; or to invoke equitable relief against the corporation to prevent it and other parties from consummating a fraudulent sale and transfer of the assets of the company, whereby the pledged stock will be rendered worthless: See the principal case; or to maintain a suit to remove a cloud from the title of corporate property: *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261. On the general subject of actions by stockholders on behalf of their corporation, see the note to *Johns v. McLester*, 97 Am. St. Rep. 29.

The fact that a stockholder has pledged his stock as collateral security does not preclude him from maintaining an action to protect

his rights as stockholder: *Fisher v. Patton*, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096. If the pledgees are directors of the corporation, and conspire to depreciate the value of the stock by exercising their official powers to that end, the wrong thus done is not only against the corporation, but also against the pledgor, for which there is direct responsibility to him: *Ritchie v. McMullen*, 79 Fed. 522, 25 C. C. A. 50.

b. **To Inspect Corporate Books.**—A stockholder has a right to inspect the books, papers, and records of his corporation at reasonable times and for proper purposes; and this the courts will enforce, not perhaps as a matter of right, but in the exercise of their discretion: See the note to *Harkness v. Guthrie*, 107 Am. St. Rep. 674. This right of inspection, however, has been denied to pledgees of stock: *In re First Nat. Bank*, 28 Misc. Rep. 662, 59 N. Y. Supp. 1042; *In re First Nat. Bank*, 44 App. Div. 635, 60 N. Y. Supp. 1138.

c. **To Vote at Corporate Elections.**—The right to vote corporate stock, as between the pledgor and pledgee thereof, at those elections in which stockholders are entitled to participate, is a question on which the authorities are not entirely harmonious. It is said by some courts that the right to vote, in the absence of an agreement, usually remains in the pledgor until default: *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007; *Ex parte Willcocks*, 7 Cow. 402, 17 Am. Dec. 525; *Ex parte Barker*, 6 Wend. 509; *State v. Smith*, 15 Or. 98, 14 Pac. 814, 15 Pac. 137, 386; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Schofield v. Union Bank*, 2 Cranch C. C. 115, Fed. Cas. No. 12,475; *National Bank of Commerce v. Allen*, 90 Fed. 545, 33 C. C. A. 169. In some of the states the statute expressly confers the right to vote on the pledgor: *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46; *American Bonding & T. Co. v. Pacific Brewing & M. Co.*, 34 Wash. 10, 74 Pac. 826. The practice appears to have obtained to some extent in equity of restraining the pledgee from voting to the prejudice of the pledgor's rights, or to compel him to give a proxy to the pledgor, where the pledgee appears on the face of the corporate records as the owner of stock: *J. H. Wentworth Co. v. French*, 176 Mass. 442, 57 N. E. 789 (citing *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291; *Vowell v. Thompson*, 3 Cranch C. C. 428, Fed. Cas. No. 17,523); *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007 (citing *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *McHenry v. Jewett*, 26 Hun, 453, 90 N. Y. 58; *State v. Smith*, 15 Or. 98, 14 Pac. 814, 15 Pac. 137, 386). As a general rule, however, if the stock has been transferred on the books of the corporation so that the pledgee there appears to be the absolute owner, he has the right to vote it, in the absence of any agreement or statute to the contrary: See the note to *Griggs v. Day*, 32 Am. St. Rep. 715; *In re Argus Printing Co.*, 1 N. Dak. 434, 26 Am. St. Rep. 639, 48 N. W. 347, 12 L. R. A. 781; *Commonwealth v. Dalzell*, 152 Pa. 217, 34 Am. St. Rep. 640, 25 Atl. 535; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

d. To Receive Dividends.—As between the pledgor and the pledgee of stock, dividends declared after the pledge belong to the pledgee, unless the pledgor has by special contract reserved a right thereto. It is the right and duty of the pledgee to collect the dividends, and apply them to the debt or hold them in trust for the pledgor. If the transfer of the stock has not been entered on the books of the corporation, but the corporation, with notice of the transfer, pays dividends to the pledgor, it becomes liable for the amount of them to the pledgee; but if the corporation has no notice of an unregistered transfer, it will be protected in paying dividends to the pledgor, who will receive them as trustee for the pledgee and be answerable accordingly: *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503; *Armour v. East Rome Town Co.*, 98 Ga. 458, 25 S. E. 504; *Bath Savings Inst. v. Sagadahock Nat. Bank*, 89 Me. 500, 36 Atl. 996; *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; *Central Nebraska Nat. Bank v. Wilder*, 32 Neb. 454, 49 N. W. 369; *Hunt v. Laconia & L. St. Ry.*, 68 N. H. 561, 39 Atl. 437; *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526; *Hill v. Newichawanick Co.*, 8 Hun, 459, 71 N. Y. 593; *Herman v. Maxwell*, 47 N. Y. Super. 347; *Boyd v. Conshohocken Worsted Mills*, 149 Pa. 363, 24 Atl. 287; *Maxwell v. National Bank*, 70 S. C. 532, 50 S. E. 195; *George A. Barse Livestock Co. v. Range Valley Cattle Co.*, 16 Utah, 59, 50 Pac. 630; *London & S. F. Bank v. Willamette etc. Mfg. Co.*, 80 Fed. 226.

II. Liabilities of Pledgee of Stock.

a. Liability to Creditors of Corporation.

1. When Transfer is on Books of Company.—One to whom stock has been transferred in pledge or as collateral security, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder to creditors of the corporation. He is liable for unpaid subscriptions to stock (*Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776; *Calumet Paper Co. v. Stotts Investment Co.*, 96 Iowa, 147, 59 Am. St. Rep. 362, 64 N. W. 782; *Tuthill S. Co. v. Smith*, 90 Iowa, 331, 57 N. W. 853; *Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 818); and he is also under the other statutory liabilities incident to the ownership of corporate stock: *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 South. 149; *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737; *Ball Electric Light Co. v. Child*, 68 Conn. 522, 37 Atl. 391; *Wheelock v. Kost*, 77 Ill. 296; *Chatham Bank v. Brobston*, 99 Ga. 801, 27 S. E. 790; *Hale v. Walker*, 31 Iowa, 344, 7 Am. Rep. 137; *Grew v. Breed*, 51 Mass. (10 Met.) 569; *First Nat. Bank v. Hingham M. Co.*, 127 Mass. 563; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Simmons v. Hill*, 96 Mo. 679, 10 S. W. 61, 2 L. R. A. 476; *Bagley v. Tyler*, 43 Mo. App. 195; *Rosevelt v. Brown*, 11 N. Y. 148; *United*

States Trust Co. v. United States Fire Ins. Co., 18 N. Y. 199; Appeal of Aultman, 98 Pa. 505; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335; Pullman v. Upton, 96 U. S. 328, 24 L. ed. 818; note to State v. Bank of New England, 68 Am. St. Rep. 542.

The liability of the pledgee, in this respect, seems to be the same as though he were the beneficial or actual owner of the stock. "For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder": *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448.

The liability of the pledgee seems to continue until a retransfer of the stock is made on the corporate books, although in the meantime the debt has been paid and the certificate returned to the pledgor: *Johnson v. Somerville D. & B. Co.*, 81 Mass. (15 Gray) 216; *Adderly v. Storm*, 6 Hill, 624.

2. **When Transfer is not on Books.**—A pledgee of stock to whom the stock has not been transferred on the books of the company, or who does not appear on such books as a stockholder, is ordinarily not liable as a stockholder to creditors: *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547; *Welles v. Larrabee*, 36 Fed. 866, 2 L. R. A. 471. And a pledgee may protect his interest in the stock, and at the same time avoid responsibility as a shareholder, by having the stock transferred to him as "pledgee": *Pauly v. State Loan etc. Co.*, 165 U. S. 606, 17 Sup. Ct. Rep. 465, 41 L. ed. 844.

3. **Evasion of Liability by Colorable Transfers.**—If a pledgee makes a transfer of stock in a failing corporation to an irresponsible person for the purpose of escaping his liability as a shareholder, the transaction is ineffectual as against creditors. But it has been decided that where stock in a national bank has been pledged with power to sell on default in the payment of the debt, a sale by the pledgee pursuant to the power is not voidable as a fraud on creditors of the bank, although he sells because he believes the bank is insolvent, and in order to escape personal liability as a stockholder: *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47. It has also been held that a transfer of pledged stock, in order to avoid liability as a stockholder, does not amount to a conversion: *Heath v. Griswold*, 18 Blatchf. 555, 5 Fed. 573. The supreme court of the United States has affirmed that a pledgee of stock in a national bank who, with no fraudulent intent, takes the security for his benefit in the name of an irresponsible trustee in order to avoid responsibility as a stockholder, and who exercises none of the rights of a stockholder, does not incur the lia-

bility of a shareholder upon a failure of the corporation: *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 4 Sup. Ct. Rep. 525, 28 L. ed. 478. But if a pledgee of stock in a national bank who causes it to be transferred to him on the books of the company, thereby incurring immediate responsibility as a shareholder, he cannot relieve himself from that liability by making a mere colorable transfer of the stock, with the understanding that it is to be retransferred to him on his request: *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448.

b. Liability for Assessments on Stock.—A pledgee of stock in a national bank who does not appear by the books of the bank or otherwise to be the owner, is not liable for assessments: *Welles v. Larrabee*, 36 Fed. 866, 2 L. R. A. 471. Neither is a pledgee of stock registered on the books of the bank as “pledged” or “collateral”: *Beal v. Essex Sav. Bank*, 67 Fed. 816, 15 C. C. A. 128; *Baker v. Old Nat. Bank*, 86 Fed. 1006. See, also, the note to *State v. Bank of New England*, 68 Am. St. Rep. 545. A pledgee of national bank stock who, in accordance with the terms of the pledge, sells it, becomes the purchaser, but never has it transferred on the bank books, is not liable for an assessment made upon the insolvency of the bank under Revised Statutes, section 5151: *Robinson v. Southern Nat. Bank*, 94 Fed. 964, 36 C. C. A. 584. And if one receives shares of stock in a national banking association as collateral security, with power of attorney to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, in good faith causes the shares to be transferred on such books to a third person under an agreement that they are still to be held as security for the debt, he is not liable for assessments: *Wilson v. Merchants' L. & T. Co.*, 98 Fed. 688, 39 C. C. A. 231; *Hayes v. Fidelity Ins. etc. Co.*, 105 Fed. 160; *Pauly v. State Loan Trust Co.*, 165 U. S. 606, 17 Sup. Ct. Rep. 465, 41 L. ed. 844.

A pledgee of stock who has rightfully paid legal assessments on the stock is entitled to have the amount of his expenditure refunded by the pledgor as a condition precedent to the latter reclaiming the stock: *McCalla v. Clark*, 55 Ga. 53; *Wells, Fargo & Co. v. Walker*, 9 N. Mex. 456, 54 Pac. 875. But he is not entitled to enforce payment, in case the stock is in a water company, by withholding water from the pledgor's land, although the stock stands in the name of the pledgee on the books of the company: *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073.

c. Liability in Case of National Bank Stock.—The liability of pledgees of stock in national banks does not seem to differ materially from the liability of pledgees of stock in other corporations: *Hale v. Walker*, 31 Iowa, 344, 7 Am. Rep. 137; *Bowden v. Farmers' etc. Bank*, 1 Hughes, 307, Fed. Cas. No. 1714; *Moore v. Jones*, 3 Woods, 53, Fed. Cas. No. 9769. “Persons who hold such stock in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the banking act, stockholders,

and, so long as they thus hold the stock in pledge, are responsible to the creditors of the bank in proportion to the amount so held. The reason for this is obvious. The stock stands on the books of the bank in his name, and he is thus held out to the public as shareholder, and persons dealing with the bank have no means of knowing the nature of the contract under which he holds the stock, and have a right to presume, and are led to believe, that he is the absolute owner of it, and it is but fair to presume that they deal with the bank upon the faith and credit of the parties thus appearing as stockholders. Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock. Until this is done they continue to be stockholders within the meaning of the banking act. If we depart from the terms of the law and inquire into the equities which may exist between the stockholders and third persons, it cannot fail to embarrass creditors in seeking a remedy for the wrongs which may have been done by the corporation. If creditors must look beyond the legal title as exhibited by the books of the bank, they can never know against whom to proceed": *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47.

d. Statutory Exemption from Liability.—In some jurisdictions the statutes exempt pledgees of stock from liability as stockholders: *Matthews v. Albert*, 24 Md. 527; *Union Sav. Assn. v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10, 27 L. ed. 359. In Iowa one holding corporate stock as collateral security is not liable for assessments thereon: *Iowa Nat. Bank v. Cooper* (Iowa), 101 N. W. 459.

e. Liability for Taxes.—Shares of stock which have been pledged as collateral security are not taxable to the pledgee if his true relation to the stock appears, at least when the transfer has not been made on the books of the corporation: *Waltham Bank v. Waltham*, 51 Mass. (10 Met.) 334; *Tucker v. Aiken*, 7 N. H. 113; *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168.

III. Remedies of Pledgee of Stock.

a. Classes of Remedies—Suit on Principal Debt.—The remedies of a pledgee of stock do not differ materially from the remedies of a pledgee of other property, in the event of the pledgor's default. In other words, he has, in addition to proceeding against the pledgor personally without selling the pledge, an election to file a bill in chancery in the nature of a foreclosure bill, and proceed to a judicial sale, or to sell without judicial process upon giving reasonable notice to the pledgor to redeem, and of the intended sale. In the absence of any special agreement, he has only these three remedies: *Robinson v. Hurley*, 11 Iowa, 410, 79 Am. Dec. 497; *Groeltz v. Cole*, 128 Iowa, 340, 103 N. W. 977; *White River Sav. Bank v. Capital Sav. Bank*, 77 Vt. 123, 107

Am. St. Rep. 754, 59 Atl. 197; American Bonding etc. Co. v. Pacific Brewing etc. Co., 34 Wash. 10, 74 Pac. 826. The general rule is well understood that one holding collateral security may enforce the principal debt when due without any resort to his security: See the notes to *Griggs v. Day*, 32 Am. St. Rep. 727; *Robinson v. Hurley*, 79 Am. Dec. 500. This rule applies in case of a pledge of stock: See "Obligation of Pledgee to Sell," post.

b. Sale of Stock.

1. **Right to Sell in General.**—When stock is pledged as collateral security for the payment of the debt, there is, in the absence of any special agreement, an implied contract that, upon default in the payment of the debt, the pledgee may demand that the stock be redeemed or the debt paid, and sell the stock at public auction after reasonable notice to the pledgor, if he does not comply with the demand: *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; *Richardson v. Insurance Co. of Valley of Virginia*, 27 Gratt. 749; *Smith v. Becker*, 129 Wis. 396, 109 N. W. 131; *Canfield v. Minnesota Agricultural etc. Assn.*, 4 McCrary, 646, 4 Fed. 801; note to *Griggs v. Day*, 32 Am. St. Rep. 730.

2. **Necessity of Demand and Notice.**—Before proceeding to sell, the pledgee must first demand of the pledgor to pay the debt or redeem the pledge, and he must also give reasonable notice of the time and place of the sale. A sale without such notice, a notice fixing a reasonable time and place of sale, constitutes a conversion: *Stevens v. Hurlbut Bank*, 31 Conn. 146; *National Bank of Illinois v. Baker*, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586; *Fowle v. Ward*, 113 Mass. 548, 18 Am. Rep. 534; *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; *Allen v. Dubois*, 117 Mich. 115, 72 Am. St. Rep. 557, 75 N. W. 443; *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; *Greer v. Lafayette County Bank*, 128 Mo. 559, 30 S. W. 319; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Markham v. Jaudon*, 41 N. Y. 235; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Gillett v. Whiting*, 120 N. Y. 402, 24 N. E. 790; *Treadwell v. Clark*, 114 App. Div. 493, 100 N. Y. Supp. 1; *Diller v. Brubaker*, 52 Pa. 498, 91 Am. Dec. 177; *Appeal of Jeane*, 116 Pa. 573, 21 Am. St. Rep. 624, 11 Atl. 862. But to constitute a conversion, there must be a tortious detention of the property or its destruction, or an exclusion or defiance of the owner's rights, or a withholding of the possession under a claim of title inconsistent with that of the owner. A pledgee is not guilty of conversion of stock if he sells it without giving notice to the pledgor, and reports the sale as being made to another who surrenders the certificate and obtains new ones in his own name, where such person never paid anything and his name was used by the pledgee to effect the sale for the latter's interest, and the stock was always in the possession of such pledgee, and he, on learning that the sale was invalid for want of notice to

the pledgor, thereafter gave new notice to the latter, and under such notice sold the stock and applied the proceeds toward the payment of the secured debt: *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87, 9 South. 299.

The pledgor is entitled to actual notice, unless there is an agreement or statute to the contrary. A mere publication or mailing of the notice is not enough: *Lewis v. Graham*, 4 Abb. Pr. 106; *Bryan v. Baldwin*, 52 N. Y. 232; *McCutcheon v. Dittman*, 23 App. Div. 285, 48 N. Y. Supp. 360.

The pledgor may, of course, waive notice or defects therein, or he may ratify a sale made without such notice as the law requires: *Downer v. Whittier*, 144 Mass. 448, 11 N. E. 585; *Granger v. Fidelity Ins. etc. Co.*, 198 Pa. 428, 48 Atl. 259. A pledgor having notice of the time and place of sale fixed by the pledgee, and making no objection thereto, and taking no notice thereof, by his silence waives any objection existing as to such place: *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 524, 48 N. E. 195.

3. **Sale Under Power Without Demand and Notice.**—Notice may be dispensed with when the pledge is accompanied with a power of sale to sell without notice. Thus if the pledgor gives the pledgee written authority, in case the stock is not redeemed at a day specified, to give the same "to any broker to sell on that day," and the pledge is not redeemed on the day specified, a sale made by a broker thereafter at private sale, for the full market value of the stock at that date, is in conformity with the authority, and valid: *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69. By words of a written agreement authorizing the pledgee, upon default, to sell without further notice, it is to be understood that when the power to sell arises, all notice of the time and place of sale is waived and dispensed with by the pledgor: *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779. And notice is not necessary where payment is demanded of the pledgor, and the contract of pledge specially authorizes the pledgee to sell "at public or private sale at his discretion," upon default being made, or upon the expiration of a certain number of days after default: *McDowell v. Chicago Steel Works*, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854. Said the court in this case: "At common law, where property is pledged to secure a debt, the right to sell for default in payment is conferred by the law, and hence the sale must be made subject to the conditions imposed by the law—that is, after making demand and giving notice. But where the pledge is accompanied by a special contract as to sale upon nonpayment of the debt, the right to sell is conferred, not by the law, but by the contract itself, and hence must be exercised in the mode specified by the parties in their agreement. As such contract embodies the intentions of the parties, its silence as to notice justifies the inference that the power to sell without notice was intended to be conferred."

It seems that the consent of the pledgor to a sale without notice does not relieve the pledgee from the necessity of demanding payment of the debt before he sells: *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307. But the pledgee has a right to sell, without notice to redeem and without notice of the sale, the stock having been pledged to secure the payment of loans on notes authorizing the holder, upon default, to so sell the stock at public or private sale, immediately upon the dishonor of the notes, the notes having been dishonored: *Appeal of Jeanes*, 116 Pa. 573, 2 Am. St. Rep. 624, 11 Atl. 862. And where the pledgee is authorized, on or after the nonpayment of the note at maturity, to sell the stock at public or private sale, without advertisement or "giving any notice" to the maker and pledgor, the sale is not invalid when made without demand and without notice of the time or place of sale, although not made until long after the maturity of the note: *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

4. Private and Public Sales.—In the absence of special authority, it is the duty of the pledgee of stock, in case he makes a sale thereof, to sell at public auction at the time and place designated in the notice. A private sale is invalid, unless specially authorized by the pledgor. Undoubtedly the pledgor may authorize a private sale without notice or demand, or a private or public sale at the option of the pledgee: *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69; *Dykens v. Allen*, 7 Hill, 497, 42 Am. Dec. 87; *Genet v. Howland*, 45 Barb. 560; *Ogden v. Lathrop*, 65 N. Y. 158; *Appeal of Jeanes*, 116 Pa. 573, 2 Am. St. Rep. 624, 11 Atl. 862; *Foot v. Utah Com. & Sav. Bank*, 17 Utah, 283, 54 Pac. 104; *Smith v. Lee*, 84 Fed. 557.

5. Protection of Pledgor's Interests.—When a pledgee sells stock on the default of the pledgor, he must have due regard for the rights and interests of the pledgor, and he is bound to exercise reasonable care and diligence to obtain what the stock is worth. Especially is this true when the sale is made under a power contained in the contract of pledge authorizing a private sale without notice: *Nabring v. Bank of Mobile*, 58 Ala. 204; *Newsome v. Davis*, 133 Mass. 343; *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; *Jennings v. Moore*, 139 Mass. 197, 75 N. E. 214; *Smith v. Lee*, 84 Fed. 557. "The power of sale must be exercised with a view to the interests of the pledgor as well as the pledgee, and a sale should not be forced for barely sufficient money to secure the payment of the debt, when the securities are known to be of more than double the value of the debt. The pledgee, under whom such a power to sell is vested, must exercise it under a trust for the debtor's benefit as well as his own. The sale must be fair, and the contract must be construed benignantly for the debtor's interest as well as that of the pledgee": *Foot v. Utah Commercial & Sav. Bank*, 17 Utah, 283, 54 Pac. 104.

6. Purchase by Pledgee.—The pledgor of stock may authorize the pledgee to purchase at his own sale, so that such a purchase will be

valid. But since a pledge is trust property, and the character of the pledgee is that of trustee, the law does not permit him to purchase at his own sale except upon an agreement with the pledgor; and if he does so, the sale is voidable at the option of the pledgor if he acts seasonably in repudiating the transaction: *Hill v. Finigan*, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494; *Wetherell v. Johnson*, 208 Ill. 247, 70 N. E. 229; *Berry v. American White Lead & C. Works*, 107 La. 236, 31 South. 733; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Manning v. Shriver*, 79 Md. 41, 28 Atl. 899; *Greer v. Lafayette County Bank*, 128 Mo. 559, 30 S. W. 319; *Hyams v. Bamberger*, 10 Utah, 3, 36 Pac. 202. "The pledgor may lawfully stipulate that the pledgee may purchase, and the stipulation may be made at the time of the pledge. The pledgor may afterward authorize the pledgee to purchase, or he may ratify such purchase after it has been made. Such ratification may even be inferred from circumstances. But such purchases are certainly voidable, and presumably void, though not conclusively so. The burden of showing authority for the pledgee to become the purchaser, or ratification, is upon the purchaser": *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592.

"A purchase by a pledgee without the consent of the pledgor is voidable, but it is not void. The pledgor has the option to affirm or to repudiate the sale, but he cannot do both. If he affirms the sale, his action validates it, and passes the title to the collaterals to the pledgee, and entitles the pledgor to the amount bid at the sale, but to no more. If he repudiates it, the sale is void, and the pledgee has the collaterals under the original pledge, with the same rights and subject to the same liabilities as if no sale had been attempted. If the pledgor repudiates the sale, the pledgee still holds the collaterals, and cannot be charged with conversion until he wrongfully parts with the possession of and control over them. Until then he holds them under the original contract of pledge, and is liable to deliver them only on payment of the debt": *First Nat. Bank v. Rush*, 85 Fed. 539, 29 C. C. A. 333.

7. **Obligation of Pledgee to Sell.**—Although a pledgee of corporate stock has a right to proceed to sell it upon the default of the pledgor, he is not obliged to do so, unless required by the contract or requested by the pledgor, but he may wait for the pledgor to redeem, or he may sue on the principal indebtedness, and if the stock depreciates in value in the meantime, he is not answerable therefor: *Hudson v. Bank of Pine Bluff*, 75 Ark. 493, 87 S. W. 1177; *Lake v. Little Rock Trust Co.*, 77 Ark. 53, 90 S. W. 847, 3 L. R. A., N. S., 1199; *Napier v. Central Georgia Bank*, 68 Ga. 637; *Furness v. Union Nat. Bank*, 147 Ill. 570, 35 N. E. 624; *Taylor v. Cheever*, 72 Mass. (6 Gray) 146; *Parberry v. Woodson Sheep Co.*, 18 Mont. 317, 45 Pac. 278; *Donnell v. Wyckoff*, 49 N. J. L. 48, 7 Atl. 672; *De Cordova v. Barnum*, 130 N. Y. 615, 27 Am. St. Rep. 538, 29 N. E. 1099; *O'Neill v. Whigham*, 87 Pa. 394; *Sinclair v. Weekes* (Tex. Civ. App.), 41 S. W. 107;

Palmer v. Hawes, 73 Wis. 46, 40 N. W. 676. This rule applies where the contract of pledge authorizes the pledgee to sell (**Rozet v. McClellan**, 48 Ill. 345, 95 Am. Dec. 551), and dispenses with notice to redeem: **Robinson v. Hurley**, 11 Iowa, 410, 79 Am. Dec. 497.

c. Foreclosure in Equity.—One of the remedies of a pledgee of stock is to proceed by bill in equity for a judicial sale of the securities. The advantages of thus proceeding in chancery are that the amount of the indebtedness and the right to sell may be established beyond controversy, and that the pledgee has a right to bid at the sale and thus prevent a sacrifice for want of bidders: **State v. Superior Court**, 13 Wash. 607, 43 Pac. 887, 46 Pac. 342; **Plankinton v. Hildebrand**, 89 Wis. 209, 61 N. W. 839; notes to **Robinson v. Hurley**, 79 Am. Dec. 505; **Griggs v. Day**, 32 Am. St. Rep. 729. A third person to whom the pledgor has assigned his interest with the knowledge of the pledgee is a necessary party to the foreclosure proceeding: **Brown v. Hotel Association of Omaha**, 63 Neb. 181, 88 N. W. 175. Neither party to a foreclosure is entitled to a jury trial: **Brigel v. Creed**, 65 Ohio St. 40, 60 N. E. 991. When certificates of stock in a corporation in one state are held as collateral in another state, the courts in the latter jurisdiction may proceed to establish a lien thereon in a suit commenced by substituted service, under a statute which authorizes such service in actions to establish liens on personal property within the state: **Merritt v. American Steel-Barge Co.**, 79 Fed. 228, 24 C. C. A. 530.

d. Care and Protection of Collateral.—As a rule, the pledgee of corporate stock is required to use reasonable care and diligence to make the collateral available and effectual for the purpose for which it was pledged. Failing in this, he is liable to the pledgor for resulting losses: **National Exchange Bank v. Kilpatrick**, 204 Mo. 119, 120 Am. St. Rep. 689, 102 S. W. 499. In the discharge of his duty in making the collateral available, he may incur reasonable expenses necessary therefor, and have a lien upon the pledge for the amount of the expenditure; but the law will not allow him to incur an unnecessary or unreasonable expense in maintaining and keeping available the collateral: **Iowa Nat. Bank v. Cooper** (Iowa), 101 N. W. 459; **Work v. Tibbits**, 87 Hun, 352, 34 N. Y. Supp. 308.

e. Bar of Statute of Limitations.—A deposit of stock as collateral security does not prevent or impede the running of the statute of limitations upon the debts secured thereby, but the bar of any action upon such debts through the running of the statute does not affect the right of the pledgee to hold and realize upon the collateral, nor of the pledgor to call for any surplus remaining after the principal debts have been paid: **Zellerbach v. Allenberg**, 99 Cal. 57, 33 Pac. 786; **Estate of Hartranft**, 153 Pa. 530, 34 Am. St. Rep. 717, 26 Atl. 104; **Miller v. Houston St. Ry. Co.**, 55 Fed. 866, 5 C. C. A. 134; note to **Griggs v. Day**, 32 Am. St. Rep. 716.

DARNELL v. COLUMBUS SHOWCASE COMPANY.

[129 Ga. 62, 58 S. E. 631.]

LEASE—Easement of Light and Air.—In the lease of a dwelling there is an implied grant of the right to light and air from adjoining land of the lessor, if the situation and habitual use of the tenement are such that the air and light are essential to its enjoyment. (p. 207.)

LEASE—Easement of Light and Air.—If a lessor cannot use his adjoining land in such a manner as to shut out necessary light and air from a dwelling which he has leased, then one to whom he thereafter rents the adjoining land cannot do so. (p. 208.)

LEASE—Damages for Injury to Tenement.—Where one of the tenants of a common landlord piles lumber on his part of the leased premises so as to obstruct the light and air of the other tenant, and so as to cast water into his tenement in order to cause him to abandon the lease, the injured tenant may recover punitive damages in addition to compensatory damages for the depreciated rental value of the tenement. (p. 209.)

G. Y. Tigner, for the plaintiff.

C. E. Battle, for the defendant.

⁶³ EVANS, J. The case made by the petition was substantially this: The owner of two adjoining lots leased them separately to the plaintiff and the defendant, the lease to the plaintiff being prior to that of the defendant. Upon the lot demised to the plaintiff was a three-room tenement, which was used as a dwelling-house. The only means of lighting and ventilating two rooms thereof was by a single window in each room, which overlooked the premises demised to the defendant. The defendant, being a manufacturing corporation dealing in lumber, piled a quantity of lumber on the lot rented by it in such a manner as to obstruct the light and air necessary for the use and enjoyment of the tenement by the other tenant, and to cause rain-water to drip into the house, rendering the house damp, unwholesome, unhealthy and uncomfortable. Other matters were also alleged, which will be noted in a discussion of the special demurrers filed. The defendant demurred both generally and specially to the petition; the demurrers were sustained, and the petition was dismissed.

The complaining tenant was a tenant by the year, and does not claim an express grant to any easement of light and air. Whatever right he may have to prevent his neighbor tenant

from obstructing his window must be founded upon an implied grant of an easement in the use and enjoyment of light and ventilation over the adjoining land of his landlord at the time of his lease. There is much conflict in the American cases on the question of implied grant of these easements. In many jurisdictions it is held that ⁶⁴ a lease of land upon which is a building depending for its light and air on windows therein, which overlook adjoining land of the landlord, does not include any right of light and air through such windows, unless expressly granted in the lease: *Myers v. Gemmell*, 10 Barb. 537; *Keiper v. Klein*, 51 Ind. 316; *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175, 34 N. E. 805, 22 L. R. A. 544. Other courts lay down the doctrine that in a lease there is an implied grant of the right to light and air from the adjoining land of the landlord, where the situation and habitual use of the demised premises is such that the right to light and air is necessary to the beneficial enjoyment of the leased premises: *Case v. Minat*, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536. See note to this case in 22 L. R. A. 536, where many of the cases are collated. The question of an implied grant of easement of light and air was before this court in *Turner v. Thompson*, 58 Ga. 268, 36 Am. Rep. 297. In that case it was held that "Where an executrix sold half a lot of land, with a tenement thereon having windows opening upon the other half lot, and bought the other half herself at the same sale, she will be estopped from obstructing the passage of light and air through such windows, if those windows were necessary to the admission of sufficient light and air for the reasonable enjoyment of the tenement which she sold; aliter, if sufficient light and air can be derived from other windows opened, or which could conveniently be opened, elsewhere in the tenement to make the rooms reasonably useful and enjoyable." The principle deduced from this decision has been incorporated in the Civil Code, section 3046, as follows: "A right to the easement of light and air over another's land through ancient lights or windows is not acquired by prescription; but where one sells a house, the light necessary for the reasonable enjoyment whereof is derived from and across adjoining land then belonging to the same owner, the easement of light and air over such vacant lot passes as an incident to the house sold, because necessary to the enjoyment thereof." The principle here stated is equally applicable to a case where the owner of two adjoining lots leases one

upon which there is a dwelling-house dependable upon a window overlooking the adjoining lot for light and air. Indeed, the reason for the rule is more cogent in a case of tenancy than of purchase. Where one purchases a tenement depending for light and air upon a window overlooking the adjoining ⁶⁵ land belonging to his grantor, in order to prevent closing the window, he must show that he cannot get light and air elsewhere over his own land; that it is a real necessity that he get it at this easement; that he cannot substitute other lights to his own building over his own property at a reasonable cost: *Thompson v. Turner*, 69 Ga. 219. A tenant, without his landlord's consent, cannot change and alter the demised tenement in any material respect. Certainly he is under no duty to alter the demised tenement to meet an exigency produced by the act of his landlord, to escape its consequences. The tenant is entitled to the use of the tenement with such necessary privileges accruing from its situation to adjoining land of his landlord at the time of the demise, and the landlord cannot deprive him of the enjoyment thereof by changing the situation in such a material way as practically to make the tenement unfit for use.

We have thus far discussed the matter as if the complaint of the tenant were against his landlord, instead of against a tenant who subsequently rented from his landlord. It is not charged in the petition that the common landlord consented, expressly or impliedly, to the commission of the acts complained of, or connived thereat. From the doctrine that a landlord is not responsible for the acts of strangers, it would follow that a tortious act done by one tenant to another tenant of a common landlord, without the authority, consent, or connivance of the landlord, is not the latter's tort, but the tort of him who does the act: *Perry v. Wall*, 68 Ga. 70. However, if the common landlord cannot use his adjoining land in such a manner as to shut out necessary light and air from a dwelling-house which he has rented, one who thereafter rents the adjoining land has no greater right or privilege in respect thereto than his landlord possessed. It follows, therefore, that the defendant cannot justify its act under the lease.

The petition should not have been dismissed on general demurrer, for another reason. It was alleged that the lumber was piled in such a way as to cause the rain-water to be thrown through the window of the plaintiff's bedroom, "thereby wetting petitioner's bedroom floor and his bedding

and bedroom furnishings, and rendering petitioner's said house, and bedroom especially, damp, close, stuffy, unwholesome and unhealthy, and exceedingly uncomfortable, to his great annoyance, and to the disturbance and ⁶⁶ violation of his right to the full, free, comfortable and reasonable enjoyment of his said dwelling-house and home." Here is charged a distinct physical invasion and interference with the plaintiff's possession, which is a positive tort. Although a tenant has no estate in the land, he is the owner of its use for the term of his rent contract, and can recover damages for any injury to such use resulting from a physical invasion of his possession: See *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

There were several special demurrers to the petition. One was directed to the allegations respecting the plaintiff's condition in life, and the nature of his vocation. Simply that the plaintiff is a poor man, and his employment is that of a night watchman, which requires him to sleep in the day, would not make the defendant liable in damages for the interference with his slumbers caused by the noises incident to the operation of a lumber-yard. Hence the sixteenth and twentieth paragraphs were subject to the special demurrers aimed at them. The allegations that the plaintiff had previously occupied the same house as a tenant for many years in the past, and was attached to the same, was entirely irrelevant, and properly stricken on demurrer. The allegation in the seventeenth paragraph that the plaintiff had renewed his lease for another term, does not aid his case. When he renewed the lease he took the premises as he found them, and cannot complain of conditions existing at the time of the renewal of his lease contract. The twenty-second paragraph of the petition declared that the various acts and deeds set forth and complained of, both in themselves and in the intent with which they were done, constituted aggravating circumstances entitling petitioner to additional damages for which he sues. The mere wrongful obstruction of the plaintiff's light, without more, would not make the defendant liable in punitive damages. But if, as charged in the petition, the lumber was piled so as not only to exclude light and air from the plaintiff's dwelling, but also to throw the rain-water into his bedroom, and this was done by the defendant for the purpose of harassing the plaintiff with a view of causing him to abandon his lease, that the defendant might get possession of the property, it would be in the province of the jury to allow

punitive damages. The other special demurrers to which no special reference has been made should have been overruled. Judgment reversed.

All the justices concur.

The Right of a Grantee to Easements of Light and Air is discussed in the notes to *Story v. Odin*, 7 Am. Dec. 49; *Pierre v. Fernald*, 46 Am. Dec. 578. As to the right of a tenant to such easements, see *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175. The easement of light and air is placed along with the easement of access, the one no more important than the other, except in degree: *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46.

SEIFERT v. WESTERN UNION TELEGRAPH COMPANY.

[129 Ga. 181, 58 S. E. 699.]

TELEGRAPH COMPANY—Liability for Physical and Mental Pain.—Where a telegraph company negligently delays the delivery of a telegram calling a physician, it is not liable for the physical and mental suffering of the sick person during the delay, for its negligence is not the proximate cause of the suffering. (p. 214.)

N. E. & W. A. Harris, for the plaintiff.

Joseph H. Hall and Warren Roberts, for the defendant.

¹⁸¹ COBB, P. J. Mrs. Seifert sued the telegraph company, alleging that her husband delivered to the defendant a message in the following words: "To Dr. R. C. Mosely, Bolingbroke, Ga. Come at once. Mrs. Seifert worse. E. C. Seifert." The defendant received the message and undertook to transmit it with reasonable dispatch. The charges demanded were paid. The message was delivered to the defendant at 12:50 P. M. on July 18th, and was not delivered to the addressee until 8:35 A. M. on the 19th. The delay was due to the gross negligence of the defendant. The message could have been transmitted in fifteen minutes, and delivered in five minutes after its arrival. The office of the addressee was within fifty yards of ¹⁸² the office of the defendant in the village of Bolingbroke, and his residence was also in that village. When the message was delivered to the telegraph company, the agent was informed that the plaintiff was ill

and suffering intensely, and that the message was to her physician, and that it was of the utmost importance that it should be transmitted without delay; and the agent agreed to do so. On July 18th the plaintiff became suddenly worse and began to suffer the most intense pain from an illness which had begun on July 5th. Dr. Mosely was her attending physician; those with her were unable to offer the slightest relief; the physician would have come at once had he received the telegram; the home of the plaintiff was only five miles from Bolingbroke, and Dr. Mosely could have reached her in thirty minutes after he received the message, and he could have relieved her within ten minutes after his arrival, and when he did arrive, on the 19th, he immediately relieved her of her most acute suffering; no other physician was accessible; the husband of the plaintiff was compelled to hire a buggy and drive through the country to Bolingbroke and secure the physician; the failure of the defendant to promptly transmit the telegram caused the plaintiff nineteen hours of most intense suffering, which affected her general health, retarded her recovery, and caused her to fall into an illness from which she suffered and still suffers; the defendant was informed of her suffering and of its character, and of the necessity for relief and the importance of prompt transmission and delivery of the telegram; and the telegram was sent by her husband for her and in her behalf, for the reason that she was unable to attend to the matter. The defendant filed demurrers, both general and special, which were sustained, and the plaintiff excepted.

¹⁸³ Where an agent sends a telegram for an undisclosed principal, the principal may bring an action in his own name for damages resulting from error in transmission which brought about a delay in delivering the telegram: *Propeller Towboat Co. v. Western Union Tel. Co.*, 124 Ga. 478, 52 S. E. 706; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811. An undisclosed principal may bring a suit in his own name for the breach of the contract made by his agent with a telegraph company, in which it agreed to transmit and deliver a telegram with reasonable dispatch, or for a breach of any duty arising out of the contract, and recover such damages as are appropriate to the form of action in which the suit is brought. It is said that the suit by the plaintiff in this case is well brought, for the reason that her husband merely acted as her agent in sending the

telegram; that she was the undisclosed principal in the contract made between him and the telegraph company, and therefore any right of action which arose out of the breach of the contract, whether it sounded in contract or in tort, could be asserted by her in her name. The averments of the petition are possibly sufficient, as against a general demurrer, to show that there was an agency, and that the transaction did not arise merely from the fact that the relation of husband and wife existed between the parties. For the purposes of the present case we will treat the action as well brought in the name of the plaintiff. The purpose of the pleader was evidently to bring an action sounding in tort, and the petition will be so construed. The only damages alleged are those resulting from the physical and mental suffering endured by the plaintiff during the hours that elapsed between the time that the doctor would have arrived if the telegram had been promptly delivered and the time at which he did arrive, being about nineteen hours. The averments of the petition made a clear case of gross negligence against the defendant. According to the averments there was absolutely no reason why there should have been such an unreasonable delay in transmitting and delivering the telegram. In an action sounding ¹⁸⁴ in tort, before there can be a recovery for any damages it must appear from the allegations that there has been a breach of some duty which the telegraph company owed to the plaintiff, and that the damages claimed were the natural and legitimate consequences of such breach of duty. The company owed a duty to the plaintiff to transmit and deliver the telegram within a reasonable time. There was undoubtedly a breach of this duty. Was the damage sustained by the plaintiff the natural and legitimate consequence of this breach of duty? Whether there can be a recovery of damages resulting from mental anguish and pain when there has been no physical tort committed is a matter about which the courts of this country are not in accord. In *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 30 Am. St. Rep. 183, 15 S. E. 901, 17 L. R. A. 430, it was held that the addressee of a telegram is not entitled to recover of the telegraph company damages on account of the mental pain and suffering alleged to have resulted from the failure of the company to deliver a message in due time. In the opinion Mr. Justice Lumpkin says: "The law protects the person and the purse. The person includes the reputation: *Johnson v. Bradstreet*

Co., 87 Ga. 79, 13 S. E. 250. The body, reputation and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of everyone by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give, in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries." There were other courts which took a contrary view of this question at the time that the Chapman case was decided, and, since that decision, rulings ¹⁸⁵ have been made in other jurisdictions which are in conflict with the rule as adopted by this court. On account of these rulings, and statutes passed in the different states, it may be safely asserted that in more than a majority of the states where the question has been dealt with, either by the courts or by the legislatures, provision has been made for the recovery of damages for mental pain and suffering in a number of cases where the transaction does not involve a physical tort: See, in this connection, *Western Union Tel. Co. v. Motley*, 87 Tex. 38, 27 S. W. 52; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, 12 S. W. 857, 6 L. R. A. 844; *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Bonner v. Western Union Tel. Co.*, 71 S. C. 303, 51 S. E. 117; *Watson on Personal Injuries*, secs. 393 et seq., 462. It will be seen that even in those states where recovery is allowed for mental anguish, independently of any contemporaneous physical injury, the damages recoverable must be the natural and proximate result of the breach of duty out of which it is claimed they arose. Without reference to what may be the rule elsewhere as to the recovery of damages merely for mental anguish, independently of a physical tort,

this court is committed, under the Chapman case (88 Ga. 763, 30 Am. St. Rep. 183, 15 S. E. 901, 17 L. R. A. 430), to the proposition that there can be, in this state, no recovery of damages in such a case. The plaintiff, therefore, cannot maintain her suit so far as it attempts to recover damages for mental pain and suffering.

But the petition also alleged that the suffering endured by her was physical, and that this could have been relieved if the telegram had been transmitted and delivered within a reasonable time. The case resolves itself, therefore, into the question as to whether the telegraph company is liable for the damages resulting to the plaintiff from physical suffering which she was enduring at the time that the telegram was delivered to the company for transmission, and which she continued to endure up to the time that the physician arrived. Can it be said that her suffering was the natural and proximate result of the failure of the telegraph company to transmit and deliver the message within due time? If so, the plaintiff is entitled to recover. If not, no recovery can be had. The Civil Code, section 3912, declares that "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious ¹⁸⁶ effect, such damages are too remote to be the basis of recovery against the wrongdoer." The suffering which the plaintiff was enduring at the time that the telegram was delivered for transmission was, of course, neither the natural or proximate result of any act of the defendant. The suffering which was endured during the nineteen hours that elapsed after the physician should have arrived and before he did arrive, was not caused by any act of the defendant. The suffering was not the result of any breach of duty, either of omission or of commission, of the defendant. This suffering would have been brought about if there had been no telegraph company and no message. But it is said that relief would have come if the telegram had been delivered within a reasonable time, and that there would have been a cessation of the suffering, and the wrongful act of the defendant was in so conducting its business as that the plaintiff was not relieved from the physical suffering which she was enduring. The mental suffering which the plaintiff endured could not be the subject of recovery, under the ruling in the Chapman case (88 Ga. 763, 30 Am. St. Rep. 183, 15 S. E. 901, 17 L. R. A. 430). The physical suffering stands upon no different

footing. There may possibly be cases where there is mental suffering and no physical suffering, though all pain necessarily involves consciousness and mental perception. There cannot be a case where there is physical suffering without more or less mental suffering: *Atlanta & West Point R. R. Co. v. Potts*, 128 Ga. 397, 57 S. E. 686. The mental suffering of the plaintiff is not recoverable, for the simple reason that it is not the natural and proximate result of the negligence of the defendant. Neither was the physical suffering the natural and proximate result of the defendant's negligence. It had its origin and continuance, not in the defendant's conduct, but in the malady with which she was afflicted. In the origin and continuance of it the defendant's conduct was not, in any sense, the preponderating cause. We are aware of the fact that there is a case in which the right to recover upon facts very similar, in fact almost identical with the present case, has been sustained: *Carter v. Western Union Tel. Co.*, 141 N. C. 374, 54 S. E. 274. But it is to be noted that this case arose in a state where a recovery for mental pain and suffering, independent of any physical tort, was allowable. There was no error in sustaining the demurrer.

Judgment affirmed.

All the justices concur.

The Recovery of Damages Against Telegraph Companies for negligence in the transmission or delivery of telegrams is discussed in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 276, and in the recent case of *Shepard v. Western Union Tel. Co.*, 118 Am. St. Rep. 796. Under the mental anguish statute of Arkansas a recovery may be had against a telegraph company for the negligent failure to deliver a telegram relieving mental anguish or suffering: *Western Union Tel. Co. v. Hollingsworth*, 83 Ark. 39, 119 Am. St. Rep. 105.

SUPREME LODGE, KNIGHTS OF PYTHIAS, v. CRENSHAW.

[129 Ga. 195, 58 S. E. 628.]

LIFE INSURANCE.—The Killing by a Husband of His Wife's Paramour, although under such circumstances that the law pronounces it justifiable homicide, is not at the "hands of justice, either punitive or preventive," within the meaning of a statute which declares that death "by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract." (pp. 218, 219.)

LIFE INSURANCE.—The Death of an Adulterer, at the hands of the husband, either while attempting intercourse with the wife or immediately after the completion of intercourse, is not within the condition of a policy of life insurance that "if death is caused or superinduced at the hands of justice, or in violation of or attempt to violate any criminal law," the insurer shall not be liable for the full amount of the policy. (p. 221.)

LIFE INSURANCE—Good Standing of Assured—Pleading.—If the plaintiff in an action on a life insurance policy makes a general allegation that the insured was a member of the defendant order in good standing at the time of his death, but does not allege the facts constituting good standing, the defendant has a right to interpose a denial to the allegation as made, and impose upon the plaintiff the burden to sustain the allegation by proof. (p. 223.)

T. H. Parker and C. H. Hardy, for the plaintiff in error.

Shipp & Klein, for the defendant in error.

196 COBB, P. J. Kate Crenshaw brought suit against the Supreme Lodge of the Knights of Pythias, alleging that the defendant was incorporated under an act of Congress, with an office and place of doing business in the county in this state in which the suit was brought; that it issued a benefit certificate and policy of insurance, insuring the life of Perry J. Williams in the sum of two thousand dollars; that the plaintiff is the mother of the insured and the beneficiary under the certificate; that the insured was a member in good standing on February 1, 1906, on which date he departed this life; that during the month of February and subsequently to his death, the plaintiff furnished proofs of death, and conformed to all of the conditions of the certificate as required, and all assessments and dues were duly paid, and the defendant has not paid the policy nor any part thereof. Judgment was prayed for the two thousand dollars, with interest. Attached to the petition as an exhibit is a copy of the certificate, which recites that it is issued upon the statements and agreements

contained in the application for the same. The defendant filed a demurrer, which was overruled, and the defendant excepted. It also filed an answer, in which it admitted the allegations as to its corporate existence and place of business in the county alleged, and that it had issued the certificate as alleged. It denied that the insured was a member in good standing, that the policy was in force on the date that the insured died, that all assessments had been paid, and that proofs of death had been furnished. It admitted that the policy had not been paid, and denied all liability thereunder. It also filed three special pleas in bar. The first ¹⁹⁷ alleged that in the application for the certificate was the following provision: "It is agreed that if death is caused or superinduced at the hands of justice, or in violation of, or attempt to violate, any criminal law, then there shall be paid" a lower sum than the face of the policy, to be calculated according to the method prescribed in the application. It is then alleged that the death of the insured was caused or superinduced by the hands of justice, for that he was shot to death by R. C. Lindsay while he was engaged in the attempt to commit the offense of adultery and fornication with the wife of said Lindsay, who discovered them under circumstances showing that the act was about to begin, and the said Lindsay acted promptly and in the burst of passion and indignation which overwhelmed him on discovering the outrage which had been done him, and that the killing was justifiable. The plea then set forth the amount that is admitted to be due under the terms of the policy, which amount the defendant tendered to the plaintiff. The second special plea, after setting forth the stipulation in the application above referred to, and also making tender of the amount admitted to be due thereunder, alleged that the death of the insured was caused or superinduced in the violation of a criminal law, in that the insured was shot to death by Lindsay immediately after he had committed the offense of adultery and fornication with Lindsay's wife, Lindsay slaying him immediately after the guilty act was over, and in the killing he acted promptly and in that burst of passion and indignation that overwhelmed him on discovering the outrage that was done him, and, if the killing was not justifiable, it would reduce the crime from murder to manslaughter. The third special plea, after alleging the stipulation in the application above referred to, and making tender of the amount admitted to be due thereunder, alleged

that the death of the insured was caused or superinduced in the violation of, or attempt to violate, the criminal laws of this state, in that he was shot to death by Lindsay while engaged in an attempt to commit the offense of adultery and fornication with the wife of Lindsay, or immediately after he had committed the offense. The plaintiff filed demurrers to the answer and special pleas, which were sustained, and the pleas stricken. The defendant excepted.

¹⁹⁸ 1. The first special plea set up the defense that the insured came to his death by the hands of justice. The agreement in the policy was that if the death was "caused or superinduced at the hands of justice," the full amount of the policy could not be recovered. The code declares, "Death by suicide, or by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract": Civ. Code, sec. 2118. It is contended, not that the death of the insured was the result of the administration of punitive justice, but that it was the result of the administration of preventive justice; that the law allows the husband to kill his wife's paramour under certain circumstances, and the killing, under these circumstances, is in the administration of preventive justice within the meaning of the code. We do not think that the word "preventive" in the code is to be given this interpretation. The word "punitive" certainly refers to death inflicted by an officer of the law in obedience to the commands of the law. The word "preventive" must be construed to refer to a killing by an authorized officer of the law or a private person standing for the time being in the attitude of a public officer; as, a member of the sheriff's posse, or the like, under those circumstances where the law authorizes the taking of human life in the advancement of public justice. It cannot be properly interpreted to ever include a killing by a private person, to avenge or prevent a private wrong, even though the circumstances be such that the homicide is justifiable. This section is to be construed in connection with the Penal Code, section 70, which enumerates the different cases of justifiable homicide, among them being the killing of a human being by commandment of the law in execution of public justice, and by permission of the law in the advancement of public justice. The word "preventive" was used to convey the same idea as is conveyed in the section of the Penal Code by the word "permission." It refers to a killing done in the advancement of public justice, and therefore

must be a killing by an officer or some one having the rights of an officer who is authorized to take human life in the advancement of public justice; and not by a private individual merely to prevent a private wrong, although the act constituting it may be also a public offense.

2. The second special plea sets forth as a reason why the ¹⁹⁰defendant is not liable for the full amount of the policy, that the killing "was caused or superinduced in the violation of a criminal law," in that the insured had committed the offense of adultery and fornication with the wife of Lindsay, and that Lindsay had slain him immediately after the act was over. The third special plea set up that the killing "was caused or superinduced in the violation of, or an attempt to violate, the criminal laws of the state," in that the insured was engaged in an attempt to commit the offense of adultery and fornication with the wife of Lindsay, and was immediately killed after the offense had been committed. Certificates issued by benefit societies usually contain a stipulation that the society shall not be liable in case of death of a member while engaged in, or in consequence of, an unlawful act. A contract having such a stipulation is not voided by the mere fact that at the time of the death of the member he was violating the law, if the death occurred from some cause other than such violation. The rule seems to be that in order to relieve the society the violation of the law must be such as to proximately lead to the death of the insured by bringing him into danger of losing his life. That is, the act of the insured must be of such a character as to increase the risk of the insurer, and be entered into under such circumstances that the insured must have known that the act he was committing was of such character as to bring him into danger of losing his life. In *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 99 Am. Rep. 469, it was said: "A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk." In that case the insured was killed while committing an assault and battery upon a member of the family of the slayer, he being a brother in law of the assaulted woman. The act of the insured was held in that case to be the proximate cause of his death, within the meaning of the law,

upon the theory that the man who makes a violent assault upon a woman knows that he puts his own person and life in danger; for any male relative, and even a stranger, may interfere to preserve the life of the assaulted. It was said in that case: "The natural result of such an illegal act as that of the assured, therefore, was to bring ²⁰⁰ his person into danger, and as death resulted his own act was the proximate cause." We do not entirely agree with the conclusion reached in that case. In *Griffin v. Western Mutual Assn.*, 20 Neb. 620, 57 Am. Rep. 848, 31 N. W. 122, the insured, with an accomplice, went to the state treasury at the capitol, and presented pistols and demanded money of the treasurer. He delivered it to them, and they started away with it, and had nearly reached the door of the capitol when they were fired upon by a policeman, and the insured was killed. It was held that the policy was not avoided under a stipulation providing that it should be void if the insured should "die while violating any law." The death of the insured in that case would not have occurred except for the crime committed by him, but his death was not the reasonable and natural consequence of the crime committed. In *Goetzman v. Connecticut Mut. Life Ins. Co.*, 3 Hun, 515, the policy provided that there should be no liability if the insured should die "in consequence of his violation of any law." It appeared that the insured was killed by a husband immediately after he had criminal intercourse with the slayer's wife; and it was held that the killing could not be treated as the natural and legitimate effect of the act of adultery. Gilbert, J., in the opinion says: "If the assured had been killed a week or a year after the injury, for the same cause, it would have been quite as direct a result thereof as when it was done. In short, the proposition that a man, who has been thus wantonly killed by another without necessity or lawful excuse, died in consequence of his own act, is logically contradictory, unless it be admitted that the killing of an adulterer follows his offense in the ordinary sequence of events. That admission we are not prepared to make": See, also, in this connection, Niblack on Accident Insurance and Benefit Societies, 2d ed., sec. 157; *Accident etc. Ins. Co. v. Bennett*, 90 Tenn. 256, 26 Am. St. Rep. 685, 16 S. W. 723; *Travelers' Ins. Co. v. Seaver*, 86 U. S. 531, 22 L. ed. 155; *Supreme Lodge Knights of Pythias v. Bradley*, 73 Ark. 274, 108 Am. St. Rep. 38, 83 S. W. 1055, 67 L. R. A. 770; *Pruden-*

tial Life Ins. Co. v. Higbee's Admr., 22 Ky. Law Rep. 495, 57 S. W. 614; Davis v. Modern Woodmen of America, 98 Mo. App. 713, 73 S. W. 923; Cluff v. Mutual Benefit Life Ins. Co., 13 Allen (Mass.), 308; Brown v. Supreme Lodge Knights of Pythias, 83 Mo. App. 633. It is deducible from the authorities that a stipulation of the character now under consideration must be given a reasonable construction, and that the liability of the company is not to be discharged unless the violation ²⁰¹ of the law consisted in an act of which the death of the insured was the reasonable and legitimate consequence. If the insured does an act which is a violation of the law, and which he knows puts his life in peril at the time that he commits it, the company is not liable under a policy containing a stipulation of the character now before us. But there must be something in the act itself, independent of other circumstances, which makes the death the reasonable consequence. Death may follow the commission of any violation of law, when the offense is a felony; for the arresting officer is authorized to kill under certain circumstances in order to effectuate an arrest; as, in the case where the insured robbed the state treasurer, he knew that under the law of the land an arresting officer, or, in some circumstances, even a private person, would have the right to slay him in order to take him; but his death resulting from the effort to arrest him was not the reasonable and legitimate consequence of the robbery that he had committed a few minutes before. One who commits the offense of adultery with a married woman well knows that his life is imperiled if the outraged husband take the guilty pair in the unlawful act, or at its beginning, or at its conclusion; but it cannot be said, as a matter of law, that the killing of the adulterer is the natural and legitimate consequence of the illicit intercourse between him and the wife of the wronged husband. Death may result, but it can be no more said that the death of the adulterer at the hands of the husband is the reasonable and legitimate consequence of the act of adultery than it can be said that the death of a felon at the hands of an arresting officer is the reasonable and legitimate consequence of the felony committed. Death does not follow in the ordinary sequence of events any more in the one case than in the other. In Gresham v. Equitable Accident Ins. Co., 87 Ga. 497, 27 Am. St. Rep. 263, 13 S. E. 752, 13 L. R. A. 838, the policy excepted

from the risk death or injury which may have been caused by fighting. The ruling in that case was simply that such a stipulation refers to voluntary fighting by the insured, or involuntary fighting brought on wholly or partially by his fault or temerity, or fighting for which he is partially responsible either as a volunteer or a rash speaker or as a wrongdoer. Fighting is an act which, in its nature and essence, is calculated to bring on injury or death. Fighting under any circumstances may be attended with disastrous consequences. Death resulting from a fight is the ²⁰² natural and legitimate consequence which is to be expected. There is nothing in the crime of adultery, although a violation of the law of the land and a great moral wrong, which, in its essence, is calculated to produce the death of the adulterer. Under some circumstances it may be the occasion of the death of the adulterer, but his death is not then the natural and legitimate consequence of the adultery itself. There was no error in striking the special pleas.

3. The certificate declared that it was issued upon evidence received that the insured was "a member in good standing" of the order. In one of the paragraphs of the petition it was alleged that the insured "was a member in good standing," and that the policy and certificate were in full force and effect on the date alleged. There was a demurrer to this paragraph, upon the ground that it did not distinctly answer the averments in the petition, but is simply a general denial, and did not put the plaintiff on notice of why the policy was not in force. Since the pleading act of 1893 it is not permissible for a defendant to file what was, in the common-law practice, a plea of the general issue. He cannot come in and file a plea merely that he is not indebted, and thus put the plaintiff upon proof of all the material averments in the petition. He is allowed, however, to deny every fact alleged in the petition, and he may interpose his denial by applying the same to each paragraph or each allegation; or he may, in one paragraph of his answer, deny all of the averments in every paragraph of the petition: Civ. Code, sec. 5051. Whatever the plaintiff alleges the defendant has a right to deny, and, if denied, the law places the burden upon the plaintiff of proving the allegation, provided it is material in itself, or the plaintiff has made it material in the manner in which he alleges it. The plaintiff saw proper to allege that the insured was a mem-

ber of the order in good standing at the time of his death. The fact that he was a member in good standing may be made up of a number of facts, but the plaintiff has seen proper simply to make a general allegation. This was, in effect, the plaintiff saying to the defendant, "Deny this allegation, and proof will be introduced to support the same." If the plaintiff had seen proper ²⁰³ to allege those things which constituted good standing, the defendant would have been required either to admit or deny each one of the facts going to make up this status. But having rested simply upon the general allegation that the insured was in good standing, the defendant had a right to interpose a denial to the allegation as made, and thus impose the burden upon the plaintiff to sustain, by proof, the allegation. This is, in no sense, an evasive answer. It is a direct answer. If the defendant had answered that it could neither admit nor deny, the answer would have been evasive; for the facts which constituted good membership are peculiarly within the knowledge of the officers of the order, and the defendant would not be permitted to put the burden of proof upon the plaintiff by a merely evasive answer. But the answer denies the allegation as made, and the allegation as made must be proved to the extent that may be necessary to show a prima facie case of liability under the policy. The defendant cannot, under this denial, set up any affirmative defense growing out of a breach of the conditions of the policy or otherwise. What is said in reference to this portion of the answer will also apply to those portions which deny that proof of death had been submitted and that all dues had been paid, etc. The court erred in striking those portions of the answer referred to in this division of the opinion.

Judgment affirmed in part, and reversed in part.

All the justices concur.

As to Whether the Death of an adulterer at the hands of the husband is a death in violation of the law within the meaning of insurance contracts, see the note to *Conboy v. Railway Officials etc. Assn.*, 60 Am. St. Rep. 164. Where the aggressor in an assault is killed, there can be no recovery on his life insurance policy: *Payne v. Union Life Guards*, 136 Mich. 416, 112 Am. St. Rep. 368; but when one brings on a personal encounter with another, but abandons it, and, while in good faith retreating to avoid further difficulty, is killed by his adversary, the death is not within the meaning of a policy exempting against liability for death in violation of any criminal law: *Supreme Lodge K. of P. v. Bradley*, 73 Ark. 274, 108 Am. St. Rep. 38.

STERLING v. PARK.

[129 Ga. 309, 58 S. E. 828.]

DEED—Omission of Grantor's Name.—A deed signed by the grantor is operative, though his name is omitted from the body of the instrument. (p. 227.)

F. M. Longley, for the plaintiff in error.

Hatton Lovejoy and Frank Harwell, for the defendant in error.

310 EVANS, J. The various assignments of error raise but one question: Is it essential that a person who signs, seals, and delivers a deed should be mentioned in the body of the deed, to be bound by it, and to make it an operative conveyance of his estate in the land? The case in hand was complaint for land, and one of the plaintiff's muniments of title was a deed in which M. C. Huntley was named as grantor, and R. E. Park as grantee, and which purported to convey, for a valuable consideration, a described lot of land in fee simple. The deed was signed and sealed by M. C. Huntley, W. H. Huntley and the defendant. Neither W. H. Huntley nor the defendant was named in it as grantor. At the time the deed was executed, the title to the land was in M. C. Huntley for life, with remainder to the others who signed the deed. The plaintiff's contention is that the deed is operative and effective as a conveyance of the estate which each maker-signer had in the land; while, on the other hand, the defendant contends that as she was not named in the deed as grantor, it is not an operative conveyance of her estate in remainder.

The point in the case has been before many courts of last resort, and there is much contrariety of opinion on the subject. We believe the true rule to be that one who signs, seals and delivers a deed, in which he is not named as grantor, is nevertheless bound by these acts as a grantor. We think an examination into the origin and reason of the contrary doctrine will demonstrate the correctness of our conclusion. At common law a deed is defined to be a writing, sealed and delivered by the parties: Coke's Littleton, 171; 2 Blackstone's Commentaries, 295. Lord Coke said: "There have been eight formal or orderly parts of a deed of feofment, viz.: 1 the premises of the deed implied by

Littleton; 2 the habendum, whereof Littleton here speaketh; 3 the tenendum, mentioned by Littleton; 4 the reddendum; 5 the cause of warrantie; 6 the in cujus rei testimonium, comprehending the sealing; 7 the date of the deed, containing the day, the month, the yeare and stile of the King, or the yeare of our Lord; lastly, the clause of hiis testibus. . . . The office of the premises of the deed is twofold: first rightly to name ³¹¹ the feofor and the feoffee; and secondly to comprehend the certaintie of the lands or tenements to be conveyed by the feofment either by expresse words or which may by reference be reduced to a certaintie": 1 Coke's Institutes, 6 a. Signing was not necessary to make a deed valid as such, at common law, and Sir William Blackstone says that "It was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds—'sealed and delivered'—continues to this day notwithstanding the statute 29 Car. II, c. 3," which requires deeds to be signed by the maker: 2 Blackstone's Commentaries, 307. Not only could any seal be used, but "a stick or any such like thing which doth make a print": Shepherd's Touchstone, 57. "In Termes de la Ley s. v. 'Fait,' reference is made to a charter of Edward III, of which the last two lines run in the English translation thus:

" 'And in witness that it was sooth

He bit the wax, with his foretooth' ": Norton on Deeds, 6.

Thus it will be seen, from the conditions prevailing at common law, the prime importance of the grantor's name appearing in the body of the deed was to identify the deed as the act of a particular grantor. Without signature, and executed with a seal indented by the prick of a pin, or imprint of a tooth, the deed could not disclose the identity of the grantor, except by mention of his name in the grant. From the very necessity of the case grew the rule that the name of the grantor should appear in connection with apt words indicating that the deed was his grant. But even at common law a deed could be made in a very informal manner. Says Lord Coke: "I have tearmed the said parts of the deed formall or orderly parts, for that they be not of the essence of a deed of feofment; for if such a deed be without premises, habendum, tenendum, the clause of in cujus rei testimonium, the date, and the clause of hiis testibus, yet

the deed is good. For if a man by deed gives land to another, and to his heires, without more saying, this is good, if he put his seale to the deede, deliver it and make lievry accordingly": 1 Coke's Institutes, 7 a. Thus it would seem that the requirement of a deed made before the statute of frauds was, not that the grantor's name should appear in formal context, but if the writing should identify the grantor, the deed should be considered his grant. Let us also recall the old common-law distinction ³¹² (obsolete in this state) between deeds-poll and indentures. The former are those made by one person only; to the latter two or more persons are parties. The case of *Scudamore v. Vandenstene* (1579), cited in 2 Coke's Institutes, 573, is grounded upon this principle. It was there held that a person could not take any immediate benefit under an indenture, or sue on any covenant contained therein, unless he was named as a party thereto. The statement of Lord Coke in that case, that no grant can be made to a person not a party to the deed, was never true except of grants of immediate interests: *Norton on Deeds*, 24. And was never applied to deeds-poll, but was limited to deeds inter partes: *Norton on Deeds*, 24; *Cooker v. Child*, 2 Lev. 74.

The question first came up in America in the Massachusetts supreme court in 1812, in the case of *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56. It was there held that a conveyance by a husband, to which the signature and seal of the wife were affixed, but her name not being otherwise mentioned in the deed, did not bar the wife's right of dower. The conclusion of the court was rested on the reason that a deed cannot bind a party sealing it unless it contains words expressive of an intention to be bound. Other courts have followed the Massachusetts court, either upon the authority of *Catlin v. Ware*, or the reason upon which the decision was placed: *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486; *Purcell v. Goshorn*, 17 Ohio, 105, 49 Am. Dec. 448; *Harrison v. Simons*, 55 Ala. 510; *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068; *Adams v. Medsker*, 25 W. Va. 127; *Cox v. Wells*, 7 Blackf. 410, 43 Am. Dec. 98; *Agricultural Bank v. Rice*, 4 How. 225, 11 L. ed. 949. Most of these decisions were based upon the ground that a wife could not relinquish her right of dower unless the conveyance contained apt words expressive of such intent. But the weakness of the reasoning, in our

judgment, is the clinging to an ancient rule of the common law which grew out of the environment and civilization of the sixteenth century, when such conditions do not exist in our own civilization. As was very pertinently said by Woodbury, J., in *Elliott v. Sleeper*, 2 N. H. 525, decided as early as 1823: "Here, however, a deed must by statute be attested; and since seals have ceased to be distinguished by peculiar devices, and education has become more generally diffused, signing would seem to be proper and indispensable. When ³¹³ a deed is signed, the utility of naming the grantor in the premises or any part of the body of the instrument appears in a great measure superseded; for 'know,' says Perkins, section 36, 'that the name of the grantor is not put in the deed to any other intent but to make certainty by the grantor': Bacon's Abridgment, 'Grant' C. This certainly is attained whenever a person signs, seals, acknowledges and delivers an instrument as his deed, though no mention whatever be made of him in the body of it; because he can perform these acts for no other possible purpose than to make the deed his own. In a deed-poll, like that under consideration, where only the grantor speaks or signs or covenants, there is still less danger of mistake and uncertainty concerning the party bound, than in deeds indented." In agreement with the New Hampshire case are *Armstrong v. Stovall*, 26 Miss. 275; *Ingoldsby v. Juan*, 12 Cal. 564; *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166. Text-writers now very generally discard as unsound the proposition that the grantor should be named as such in the deed, and approve those cases which hold that the conveyance is operative when signed by the grantor, though his name be omitted from the body of the instrument: 3 Washburn on Real Property, 2120; 1 Devlin on Deeds, sec. 204.

The requisites of a deed under the code are, that it must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser, or some one for him, and be made on a valuable or good consideration. No prescribed form is essential to the validity of a deed, and the instrument will be deemed sufficient if it make known the transaction: Civ. Code, secs. 3599, 3602. We think that the deed under discussion measures up to these statutory essentials, and is effective as a conveyance of the defendant and her coremainderman, though their names are not men-

tioned in the body of the instrument: See, in this connection, *Ball v. Wallace*, 32 Ga. 170.

Judgment affirmed.

All the justices concur.

For Authorities in opposition to the principal case, see Peabody v. Hewett, 52 Me. 33, 83 Am. St. Rep. 486.

WHITE v. SIKES.

[129 Ga. 508, 59 S. E. 228.]

SPECIFIC PERFORMANCE—Prayer for General Relief.—Where the only prayers in a petition are for specific performance and general relief, the only relief that can be granted is such as is connected with the specific prayer. (p. 229.)

INFANTS—Repudiation of Contract to Convey.—Where an infant makes an executory contract to convey land, and expends the money in obtaining a professional education, he is not required to make any tender as a condition to repudiating the contract on his arrival at majority. (pp. 230, 231.)

J. C. Moore and W. T. Barkhalter, for the plaintiff.

Isaiah Beasley and James K. Hines, for the defendant.

508 ATKINSON, J. This was a petition praying for the specific performance of a contract for the sale of land, which the judge dismissed, on oral 509 motion, upon the ground that no cause of action was set forth. It appears that Victoria E. Sikes was the owner of a tract of land which she conveyed to her minor son, James Clifford Sikes, the defendant in the present case. The deed is in the ordinary form of a conveyance in fee simple with warranty, except that immediately following the name of the grantee in the granting clause appear these words: "Except privilege of control and management until such time as he may be made competent by law, said property for the time being to be managed and controlled by the said Victoria E. Sikes." While the defendant was still a minor, with his mother, he approached White, the plaintiff, and a request was made by them of White that he purchase the land in order that the defendant might use the purchase money to educate himself as a dental surgeon. The purchase price

of the land was agreed upon, which was at the rate of three dollars per acre, the acreage to be determined by a survey, which was afterward made and the exact acreage found to be three hundred and sixty-seven acres. The defendant and his mother united in a bond for titles, delivered to the plaintiff, and accompanying this bond for titles was a written statement by the mother that the defendant would be of full age on a named date, which was about nine months after the date of the transaction, and that he was then a free trader, doing business in his own name, and that she was unable to furnish him with the money necessary to finish his professional education, and a sale of the land was necessary for that purpose. The petition charges that with the consent of the mother the defendant collected the purchase money of the land and appropriated it to the payment of his expenses while in attendance upon a dental college. On the very day that the defendant arrived at age he wrote the plaintiff a letter in which he refused to make a deed in compliance with the bond, giving as his reason that he was a minor at the time that the bond was executed; and it is alleged that he still refuses to make the deed. It is also alleged that the purchase price of the land was reasonable and was the full value of the land at the time of the sale. The plaintiff averred his willingness to do and perform any and all acts that equity and good conscience required him to do; and he prayed a decree that the defendant be required to execute and deliver a warranty deed in accordance with his bond; and for general relief.

⁵¹⁰ The only prayers in the petition are for specific performance and general relief. Hence the only relief that can be granted under this petition would be that connected with the specific prayer: See *Sapp v. Williamson*, 128 Ga. 743, 58 S. E. 447. It is therefore only to be determined whether under the allegations of the petition the plaintiff was entitled to a decree for specific performance of the contract contained in the bond for titles. This was a mere executory contract of the infant. The contracts of an infant are voidable, except for necessities: Civ. Code, sec. 3648. If an infant, by permission of his parent or guardian, or by permission of law, engages in any business as an adult, he is bound for all the contracts connected with the business: Civ. Code, sec. 3650. But a mere single transaction by an infant does not constitute him one engaged in a business. If an infant,

with the consent of a parent, were engaged in the business of buying and selling real estate, and there were no question about the fact that such was his occupation, he would be unquestionably bound by the contracts relating to that business; but that is not this case. The infant was engaged in no business whatever. As far as can be determined from the averments of the petition, he was at home with his mother. He was desirous of obtaining a professional education to fit him for business, but he was at the time engaged in no business. The contract in question was simply one isolated transaction not connected with any occupation or business whatever: *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788.

But it is said that the law declares that if an infant receives property, or other valuable consideration, and after arrival at age retains possession of such property or enjoys the proceeds of such valuable consideration, this is such a ratification of the contract as will bind him: Civ. Code, sec. 3648. If an infant makes a contract, either executory or executed, and receives the consideration in whole or in part during his minority and disposes of the same before his majority, either by losing, expending, or squandering it, this is nothing more than the law anticipates of him, and he will not be required to make any tender of the amount so disposed of before repudiating the contract which he made during his infancy: ⁵¹¹ *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788. But if, upon arrival at majority, he has in his possession either the exact consideration that he received during infancy or any substantial part of the same, or property which is purchased with such consideration—that is, if he has then anything of a substantial nature into which can be traced the proceeds of the contract made during his infancy—then neither law, equity, nor good conscience will permit him to repudiate his contract and retain that which is the fruits of the contract. But it must appear that the infant, after attaining majority, retains possession and control of something which is tangible, which has become his property as a result of his having used the consideration paid to him under the contract made while he was an infant. If he expends the amount in the purchase of food and the food is consumed, the principle alluded to would have no application; and so, if he used the land in the purchase of an education, which is a thing of

value in a sense, but is intangible, the principle would have no application: 2 Warvelle on Vendors, 2d ed., sec. 860. Under the averments of the petition, the infant was not required to make any tender as a condition to his repudiating the contract on his arrival at his majority. It distinctly appears from the averments of the petition that he had none of the money that he had received; for it is alleged that he had expended all of it. There is no allegation that he had in his possession any property which was purchased with the money which had been paid to him. It is true that it is alleged that the money was expended by the infant in taking a course in a dental college; but what he acquired in this way was not properly within the meaning of the rule requiring that he should pay back the value of the property which he had acquired as a result of the contract. It may be that the education thus received would be of value to him, but it is not a thing of value within the ordinary meaning of that term, and the law does not require him to estimate its value and tender the amount of the estimate thus made: See, in this connection, *Timmerman v. Stanley*, 123 Ga. 850, 51 S. E. 760, 1 L. R. A., N. S., 379. Under no view of the case was the plaintiff entitled to a decree for specific performance, and the court did not err in dismissing the case for the reason that no cause of action was set forth.

Judgment affirmed.

All the justices concur, except Holden, J., who did not preside.

A Minor is not Required, as a condition to disaffirming his conveyance of land, to restore a consideration received for it which is not in his possession when he reaches majority, but which has been wasted or spent during his minority: *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464. See, too, *Brooks v. Sawyer*, 191 Mass. 151, 114 Am. St. Rep. 594; *Wallace v. Leroy*, 57 W. Va. 263, 110 Am. St. Rep. 777.

PERRY v. BRITT-CARSON SHOE COMPANY.

[129 Ga. 560, 59 S. E. 216.]

EXEMPTIONS—Waiver in Partnership Note.—A waiver of exemption and homestead rights in a note signed by a partner in the firm name is effectual as against his individual property. (p. 233.)

G. Y. Harrell, for the plaintiff in error.

Slade & Swift and T. T. James, for the defendant in error

⁵⁶⁰ **BECK, J.** Turner & Perry, a partnership, being indebted to the Britt-Carson Shoe Company for merchandise in the sum of \$500, made and executed to that company two promissory notes for \$250 each, containing waivers of their rights to homestead and exemption under the constitution and laws of Georgia and of the United States. These notes were signed by Perry, one of the partners, in the name of the partnership, Turner & Perry. Subsequently Turner & Perry were, upon the application of certain creditors, adjudicated bankrupt by the proper court of bankruptcy. It appears from the agreed statement of facts that the indebtedness of said firm was \$5,200, and its assets amounted to \$2,298. It was also agreed that said \$2,298 was all the assets of Turner and Perry, as a firm or as individuals, except the amounts which were set apart as an exemption to said parties out of their individual property. Certain property of the value of \$1,400, consisting of an undivided one-half interest in three hundred and forty-four acres of land, belonging to Perry individually, was set apart to him as an exemption by the court of bankruptcy. The property set apart to Turner as an exemption consisted ⁵⁶¹ in household and kitchen furniture and a buggy, of the total value of \$250. The Britt-Carson Shoe Company did not prove its claim in bankruptcy, but, after the exemption to Perry had been set apart, filed in the superior court an equitable petition against Perry, in which it alleged the facts stated above, and prayed a judgment in rem against the property set apart to Perry as an exemption, and also prayed that Perry be enjoined from selling, encumbering, or otherwise disposing of said property, until a judgment for the amount of the indebtedness on said notes could be obtained. To this petition the defendant demurred on the grounds that

there is no cause of action set forth in the petition; that the plaintiff does not show by the petition that Perry has ever waived the right to claim homestead or exemption out of his individual property; and that the plaintiff has no right to proceed against the individual property of this defendant until they have first exhausted their rights and remedies against the assets of the partnership. The court granted the injunction restraining Perry from selling, encumbering or otherwise disposing of the undivided one-half interest in the three hundred and forty-four acres of land, which had been set apart to him as an exemption, until the further order of the court. Perry excepted.

The notes held by the plaintiff were signed by one of the partners, Perry, in the name of the partnership, Turner & Perry. And it is contended by counsel for plaintiff in error that the waiver contained in the notes will not prevent the members of the firm from claiming an exemption out of their individual property. As applied to Turner, this contention seems to be well taken. "One partner cannot waive the other's right to take a homestead out of the individual property of the latter": *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. 115. But as to Perry, who signed the notes in the firm name, another rule prevails. A case involving this same point was adjudicated by the supreme court of Alabama, where it was held that "The note containing such waiver being signed by one partner in the partnership name, without authority of his copartner, the waiver was effectual against him and his individual property, though it does not bind his copartner": See, also, in this connection, *Lippman v. Anniston* ⁵⁶² *National Bank*, 120 Ala. 123, 74 Am. St. Rep. 28, 24 South. 581; 22 Am. & Eng. Ency. of Law, 2d ed., 153; 18 Cyc. 1452.

The plaintiff did not prove its claim in the court of bankruptcy, and it is admitted in the agreed statement of facts that the indebtedness of the firm of Turner & Perry greatly exceeds its assets, which are being administered by the court of bankruptcy. There is no partnership property, therefore, against which the plaintiff can proceed either in law or in equity. This, then, gives the plaintiff a right to rely upon the separate property of the partners for the payment of their notes: Civ. Code, sec. 2627. The defendant Perry, one of the partners, has \$1,400 worth of property set apart to him, as an exemption, out of his separate property. And,

as we have seen above, he has waived that exemption as against the payment of these notes. This being established, the rulings in *Bell v. Dawson Grocery Co.*, 120 Ga. 628, 48 S. E. 150, are controlling in the present case; and therefore we hold that the court committed no error in granting the injunction as prayed.

Judgment affirmed.

All the justices concur, except Holden, J., who did not preside.

For Authorities in support of the principal case, see Lippman v. First Nat. Bank, 120 Ala. 123, 74 Am. St. Rep. 28, and cases therein cited.

CROSBY v. PITTMAN.

[129 Ga. 573, 59 S. E. 279.]

RES JUDICATA—Estoppel by Verdict.—The rule that a verdict not followed by judgment is not an estoppel does not apply where the parties agree or acquiesce in a verdict without the entry of a judgment. (p. 236.)

T. H. Parker and W. C. McCall, for the plaintiff.

Edwin L. Bryan, for the defendant.

573 BECK, J. This was an equitable petition filed by the plaintiff Crosby to enjoin the defendant Pittman from trespassing or otherwise interfering with a certain tract of land alleged to belong to the plaintiff. The defendant claimed the land in dispute, which consisted of about thirty-five acres. The plaintiff and defendant were coterminus land owners, and the main question in the case was in regard to the location of the boundary line between their respective lots. The defendant alleged in his answer that in the year 1900 this same thirty-five acres had been the subject matter of another suit between this same plaintiff and one Isam, defendant's grantor, and that "a verdict was returned into court against the said Crosby and in favor of the said Isam, and a few days afterward the said Crosby paid to the said Isam the sum of fifty-two dollars and fifty cents, being the amount that had been found by the jury

against her for rent on said thirty-five acres, and no motion for a new trial was ever made by the said Crosby, and, on the contrary, she fully acquiesced in the finding of the jury, and from that time until December, 1904, no claim has ever been made by her to said ⁵⁷⁴ thirty-five acres." It is conceded that no judgment was ever entered upon said verdict; but the defendant sets up said verdict as a plea in bar to the plaintiff's present action. This was the only issue submitted to the jury, and the jury returned a verdict "in favor of the plea in bar." The plaintiff moved for a new trial upon various grounds. The motion was overruled, and the plaintiff excepted.

1. The general rule in regard to estoppel by res judicata is thus stated in the case of *Walden v. Walden*, 124 Ga. 145, 52 S. E. 323. "It has been ruled by this court as settled law that a verdict not followed by a judgment will not serve as such an estoppel, and that it is essential that a judgment be entered on the verdict before the parties will be concluded as to the matters in controversy: *Carstarphen v. Holt*, 96 Ga. 703, 23 S. E. 904; *Mitchell v. Mitchell*, 97 Ga. 795, 25 S. E. 385; *Webster v. Dundee Mortgage etc. Co.*, 93 Ga. 278, 20 S. E. 310; *Harris v. Gano*, 117 Ga. 934, 44 S. E. 11." But that this rule is not without some slight limitation is shown by the case of *Webster v. Dundee Mortgage Co.*, 93 Ga. 278, 20 S. E. 310, in which it was held that "Where, in the court below, and in this court, counsel on both sides have treated the verdict as serving the office of judgment as well as of verdict, any objection on account of the failure to enter up judgment may be considered as waived."

A case involving the same question now under consideration was decided by the supreme court of Pennsylvania in *Shaeffer v. Kreitzer*, 6 Binn. 430, where it was said: "No judgment has been entered, but the defendant showed his acquiescence in the verdict by the payment of costs and delivery of possession. No other case exactly like this has occurred, but it falls within the principle of a verdict and judgment. It appears by the acts of the defendant that no objection was made to the verdict. There was no occasion to enter judgment, because the fruits of a judgment (the costs of suit and possession of the land) were yielded by the defendant and enjoyed by the plaintiff. I am, therefore, of opinion that the former verdict was properly admitted in evidence." This case is cited in 1 Herman on

Estoppel, section 469, page 566, where the rule is stated thus: "When the parties agree, either expressly or by implication, that a verdict shall be final and conclusive as between ⁵⁷⁵ them, without the entry of a judgment, it will operate as an estoppel, on proof of the understanding or agreement."

The facts presented by the record before us fall clearly within the rule last announced. It was proved by witnesses in behalf of Pittman that Crosby paid the amount of rent found by the jury to be due by her to Isam, the defendant in the former suit; that immediately after the trial she surrendered possession of the land to Isam, and that Pittman, who purchased the land from Isam, is now in possession of the same. And these facts are nowhere denied by the plaintiff. Upon this issue the husband of the plaintiff testified as follows: "I represented her [plaintiff] in the litigation which had been conducted heretofore. She was with me when I paid some money. Our attorney told us it went against us, and we had better pay the cost and what they claimed for rent. . . . After the trial I paid some money to [P.]. He was representing Isam at that time. They told us we had better pay up. Said the case had gone against us. That was our lawyer's advice, and we went ahead and settled. . . . After the trial Isam took possession of that land. It was two years before I undertook to go back on that land." In addition to the facts already stated, it appears that the agreement to settle the dispute, upon the finding of the jury, without the entry of a judgment, was based upon an additional consideration moving from Isam to Crosby. The evidence upon this point is not altogether clear, the testimony having been very poorly transcribed, and being in part unintelligible. The attorney who represented Crosby in the former suit testified that a part of the land in dispute was under fence, and a part was not. "The part under fence [presumably the thirty-five acres involved in the present case] had been held by Mrs. Crosby pending the litigation. We agreed that she could pay rent on the land that she held at the rate of one dollar and fifty cents an acre [this being the rate fixed by the jury]. . . . And we who lost the suit should have the land that was not under fence. I told P. [the attorney for Isam] that I would advise my client to pay him that rent. I saw the husband of my client, who was the person with whom I talked most,

advised him to do it. We agreed for the decree to be drawn that way. . . . I would not like to say that the agreement that my client was to have the land outside of the fence was the only reason that kept me from filing a ⁵⁷⁶ motion for new trial in the case. I knew that the court had adjourned and the jury had gone. I recognized that I could drive home a little contract to my advantage, and did it."

Under the law as we have stated it above, the verdict was demanded by the evidence in the case, and the other matters complained of, if errors, were harmless.

Judgment affirmed.

All the justices concur, except Holden, J., who did not preside.

The Verdict of a Jury is ordinarily not admissible as evidence to create an estoppel before it has received the sanction of the court by passing into judgment: *Dougherty v. Lehigh Coal etc. Co.*, 202 Pa. 635, 90 Am. St. Rep. 660; *McReady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333.

NEAL v. BOYKIN.

[129 Ga. 676, 59 S. E. 912.]

ADMINISTRATION—Relief in Equity for Fraud.—A court of equity has power to set aside the judgment of a court of ordinary granting letters of administration, on the ground that it was procured by a fraudulent representation of jurisdictional facts. (p. 239.)

ADMINISTRATION—Jurisdiction to Grant Letters.—The existence of a promissory note in one county, when the maker resides in another county, does not confer jurisdiction on the probate court in the former county to grant letters of administration on the estate of the deceased nonresident payee. (p. 241.)

ADMINISTRATION—Jurisdiction to Grant Letters.—For the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor, and the locality of the debt for this purpose is not affected by a promissory note or bill of exchange having been given for it. (p. 242.)

ADMINISTRATION.—A Temporary Administrator has no authority to maintain a suit in equity to set aside the appointment of a permanent administrator. The heirs and creditors are the proper parties plaintiff. (p. 243.)

J. D. Kilpatrick, J. W. Moore, J. J. Bull and W. T. Letford, for the plaintiffs.

Green, Tilson & McKinney, for the defendant.

677 BECK, J. John Neal, Hiram Neal, Welborn Neal and W. W. Beall, as heirs at law of McCormick Neal, deceased, and Bull and Alexander, as creditors of the decedent, filed an equitable petition to the superior court of DeKalb county, against Boykin, seeking to set aside or vacate a judgment of the court of ordinary of DeKalb county, appointing defendant administrator on the estate of McCormick Neal. The petitioners allege that the defendant falsely represented to the court that McCormick Neal, a nonresident of this state, had assets in DeKalb county; that the decedent had no property of any kind in DeKalb county, and the court of ordinary of said county was without jurisdiction to appoint an administrator on the estate of said Neal; that the appointment of the defendant was obtained by fraud, and petitioners had no knowledge that proceedings were pending before the court of ordinary of DeKalb county; that the deceased left certain property in Talbot county, Georgia, and Stephen Neal has been legally appointed temporary administrator upon said estate in Talbot county. The defendant demurred as follows: "Because plaintiff's petition shows that if any cause of action exists against the defendant by reason of the facts alleged in said petition, 678 which is denied by defendant, the cause of action does not lie in favor of plaintiffs, but in favor of Stephen Neal, whom they allege has been appointed [temporary] administrator of said McCormick Neal's estate. Because plaintiff's petition and the exhibits thereto attached show that defendant was regularly appointed administrator of the estate of McCormick Neal, deceased, and any objection that plaintiffs wished to make to said appointment should have been made in response to the published citation upon the application of defendant to be appointed administrator of said estate; that the order appointing defendant administrator of said estate cannot be thus collaterally attacked; that the issues now raised were adjudicated by said order appointing defendant administrator of said estate; that plaintiffs have had their day in court and cannot now be heard upon the issues raised. Because the allegations of said petition are not such as to show that the

defendant has been guilty of any fraud whatever. Because plaintiff's petition, with the exhibits thereto attached, show that the court of ordinary of DeKalb county had jurisdiction of the estate in question, and that the appointment of defendant was regular. Because the allegations contained in plaintiff's petition show that there is no equity in said petition, and set forth no cause of action against this defendant." The court sustained the demurrer and dismissed the petition; and the plaintiffs excepted.

1. Courts of ordinary in Georgia have general and exclusive jurisdiction of "the granting of letters testamentary, of administration, and the repeal or revocation of the same": Civ. Code, sec. 4232. And the judgment of a court of ordinary granting letters of administration is entitled to that conclusiveness which attaches to the judgments of other courts of general jurisdiction: *Maybin v. Knighton*, 67 Ga. 103. The question here presented is whether such a judgment can be attacked directly, in a proceeding instituted for that purpose, in a court of equity on a proper case made. This question has been adjudicated in a number of cases decided by this court. "The judgment of a court of competent jurisdiction may be set aside for fraud, accident, or mistake, unmixed with the negligence or fault of the complaining party, by a decree in chancery, ⁶⁷⁹ or in a court of law under our practice, by appropriate pleadings, and by making the necessary parties to the proceeding for that purpose": *Dugan v. McGlann*, 60 Ga. 353. In the case of *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134, Mr. Justice Cobb said: "If it could be made to appear that the judgment of the court of ordinary appointing the Joneses administrators was the result of a fraud perpetrated upon that court by a false representation that Lamar was a resident of the state at the time of his death, it may be that the defendants would have a remedy by a direct proceeding in equity to set aside this judgment on the ground of fraud: See, in this connection, *Collier v. Simpson*, 74 Ga. 697; *Langmade v. Hamilton*, 89 Ga. 441, 15 S. E. 535; *Phillips v. James*, 115 Ga. 425, 41 S. E. 663." In the case of *Wallace v. Walker*, 37 Ga. 265, 92 Am. Dec. 70, the court said: "Wallace died in the state of Tennessee, the place of his domicile, leaving a will appointing an executor, who was duly qualified as such in the probate court of that state, and such executor filed an exemplified copy of his appointment in court, as required by

the code, exhibited his bill against the defendant, who had been appointed administrator on the estate of the deceased by the court of ordinary of this state, and, as such, had collected and received a portion of the personal estate of the deceased, alleging that said defendant represented to the court of ordinary, at the time of his appointment, that the deceased had died intestate, when he knew that he died leaving a will. Held, that a court of chancery in this state has jurisdiction to maintain a suit, in behalf of such foreign executor, to set aside the letters of administration so granted, upon the ground of fraud in obtaining the same." And in the case of *McArthur v. Matthewson*, 67 Ga. 134, it was held that "Equity has jurisdiction to set aside a judgment granting letters of administration, where such judgment was obtained by fraud." And in the case of *Davis v. Albritton*, 127 Ga. 517, 119 Am. St. Rep. 352, 56 S. E. 514, 8 L. R. A., N. S., 820, it was held that the heirs of the decedent could maintain a direct proceeding to have a judgment, admitting to probate the copy of a lost will, set aside on the ground that the party obtaining the judgment had fraudulently misrepresented to the court the facts necessary to give the court jurisdiction, when such jurisdictional facts did not exist: See, also, *Tant v. Wigfall*, 65 Ga. 412; Civ. Code, sec. 5370. It follows from the authorities cited above that if the court of ordinary of DeKalb county had no jurisdiction to grant letters of administration on the estate of McCormick ⁶⁸⁰ Neal, and the granting of the same was the result of a fraud perpetrated upon the court by a false representation that the necessary jurisdictional facts did exist, a court of equity would have power to set aside the judgment granting said letters of administration, on the ground of fraud in its procurement.

2. Did the facts alleged in the plaintiff's petition bring this case within the rule just announced? The Civil Code, section 4234, provides that: "The ordinary can grant administration upon no person's estate who was not a resident of the county where the application was made at the time of his death, or, being a nonresident of the state, has property in said county, or a bona fide cause of action against some person therein." The decedent, McCormick Neal, a nonresident of this state, having died in the state of Florida, the existence of bona notabilia in DeKalb county was a necessary jurisdictional fact upon which to grant letters of

administration in that county. The petition alleges that at the time of the death of McCormick Neal, said decedent left no property of any kind or character in DeKalb county, Georgia, and, at the time said defendant applied for letters of administration on the estate of said Neal, there was situated and located in DeKalb county no property of any kind belonging to the estate of said decedent, except a certain promissory note executed in 1887 by one Culpepper; that said Culpepper is a resident of Talbot county, Georgia, and is wholly insolvent. Petitioners allege that the carrying to DeKalb county of the said promissory note was for the fraudulent purpose of giving to the court of ordinary of DeKalb county jurisdiction to appoint the defendant administrator on said estate, and that said defendant was guilty of fraud when he alleged in his application to the court of ordinary of DeKalb county that some portion of the estate of McCormick Neal was located in DeKalb county; that this allegation was not true, and that defendant knew it was not true.

Mr. Schouler, in his work on Executors and Administrators (third edition), section 25, says: "Local jurisdiction [to appoint an administrator on the estate of a nonresident decedent] is upheld on the ground that bona notabilia exist when letters are applied for, notwithstanding the goods were brought into the country, or the debtor removed thither subsequently to the death of the owner or creditor; and this seems the better opinion, unless such bringing in or removal was in bad faith, and with the intention of conferring improperly ⁶⁸¹ a colorable probate jurisdiction." And so we hold, in the present case, that if the note was brought into DeKalb county, as alleged in the petition, as a part of a fraudulent scheme for the purpose of giving falsely a colorable and pretended jurisdiction to the court of ordinary of that county, it would not be bona notabilia within the county of DeKalb for the purpose of founding administration. But irrespective of the question of bad faith in bringing the note into DeKalb county, the mere existence of such promissory note in that county payable to the decedent, when the maker of the note resides in Talbot county, would not confer jurisdiction on the probate court of DeKalb county to grant letters of administration on the estate of the deceased nonresident payee. In the case of *Arnold v. Arnold*, 62 Ga. 627, it was held that, for the

purpose of granting letters of administration on the estate of a nonresident decedent, "debts by simple contract are bona notabilia in the county where the debtor resides." And in the case of *Wyman v. Halstead*, 109 U. S. 654, 3 Sup. Ct. Rep. 417, 27 L. ed. 1068, Mr. Justice Gray said: "The general rule of law is well settled that, for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable." The doctrine here stated is an enunciation of the common law upon the subject dealt with, and is in harmony with the rule deducible from our Civil Code, sections 3393, 4234, which are an adoption and codification of the common law upon the subject of the grant of administration on the estate of a nonresident: See, also, 11 Am. & Eng. Ency. of Law, 2d ed., 764; 18 Cyc. 73. If, therefore, the allegations of the petition are true (and they must be so considered in passing upon the general demurrer), the court of ordinary of DeKalb county had no jurisdiction to grant letters of administration upon the estate of McCormick Neal, deceased, and the rendition of the judgment appointing such administrator was procured by fraudulent representations, upon the part of the defendant in this case, as to the facts necessary to give the court jurisdiction.

3. It is alleged in the petition that one Stephen Neal, of Talbot county, has been legally appointed temporary administrator on ⁶⁸² the estate of McCormick Neal, deceased, in Georgia; and defendant contends that the temporary administrator was the proper party to institute and maintain the present proceedings to set aside the judgment appointing defendant permanent administrator. The Civil Code, section 3359, gives the ordinary power to appoint a temporary administrator "upon any unrepresented estate, for the purpose of collecting and taking care of the effects of the deceased," to continue until permanent letters are granted. Section 3361 declares that "a temporary administrator may sue for the collection of debts or personal property of the intestate." As was said by Chief Justice

Simmons, in the case of *Banks v. Walker*, 112 Ga. 542, 37 S. E. 866: "There is no other section of the code which can be construed as giving to the temporary administrator any larger powers than these. . . . Under our code a temporary administrator is appointed to collect the personal property and to protect it from waste and deterioration, and preserve it until permanent letters are granted. . . . If the legislature had intended to confer upon a temporary administrator the same powers which are vested in a permanent administrator, it would certainly not have used language apparently restricting his power, as in the code. It is quite clear, from the language of the sections mentioned above, that the intention was merely to have some one appointed to look after the personal property of the estate during the interval which has to elapse before a permanent administrator can be appointed." Accordingly, it was held in the *Banks* case (112 Ga. 542, 37 S. E. 866) that a temporary administrator could not maintain an action to recover land alleged to belong to the estate which he represents.

An action to set aside or vacate the judgment of the court of ordinary, appointing a permanent administrator, is not a suit concerning personal property, nor was it instituted "for the purpose of collecting and taking care of the effects of the deceased." And we do not think that the temporary administrator has any power or authority to institute and maintain a suit for the purpose of setting aside or vacating such judgment.

The petitioners in the present case were heirs and creditors of the decedent. They were interested in the assets of the estate, and their distribution. They would, therefore, have been heard as caveators when the application for letters of administration was pending: *Towner v. Griffin*, 115 Ga. 965, 42 S. E. 262. And it is quite clear ⁶⁸³ that they are the proper parties plaintiff to the proceeding to vacate or set aside the judgment appointing the administrator: See *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134. The fact that citation was published would not prevent the plaintiffs, who had no knowledge of the application for letters of administration, from moving in due time to have the judgment, appointing the administrator, set aside: *Davis v. Albritton*, 127 Ga. 517, 119 Am. St. Rep. 352, 56 S. E. 514, 8 L. R. A., N. S., 820.

4. The plaintiff's petition set forth a good cause of action, and it was error for the court to sustain a general demurrer thereto.

Judgment reversed.

All the justices concur, except Holden, J., who did not preside.

Courts of Equity are generally regarded as having jurisdiction to set aside the orders and decrees of probate courts, on the ground of fraud, mistake and the like: *Ewing v. Lamphere*, 147 Mich. 659, 118 Am. St. Rep. 563; *Nelson v. Cowling*, 77 Ark. 351, 113 Am. St. Rep. 155; *Wallace v. Swepston*, 74 Ark. 520, 109 Am. St. Rep. 94; *Willis v. Rice*, 141 Ala. 168, 109 Am. St. Rep. 26; *Freobrich v. Lane*, 106 Am. St. Rep. 639.

BUTTS COUNTY v. JACKSON BANKING COMPANY.

[129 Ga. 801, 60 S. E. 149.]

COUNTIES.—The Fiscal Policy of Counties prescribed and enjoined by the constitution of Georgia is, that all lawful liabilities must be paid out of the revenues raised for the year in which the liabilities are incurred. No departure from this course is allowable except in case of loans to supply a casual deficiency of revenue, and in case of debts created by authority of a previous plebiscite note. (pp. 247, 248.)

CONSTITUTIONS.—One of the Aids in Constitutional Construction is an examination of the proceedings of the constitutional convention. (p. 248.)

COUNTIES—Power to Borrow Money.—While it is permissible for a county with an empty treasury to incur a liability for a current expense, to be discharged from the funds raised by taxation during the current year, and yet not create a debt within the meaning of the constitutional inhibition, it does not follow that a contract for the loan of money to pay such liability is not such a debt. There is a fundamental difference between incurring a liability to one person and borrowing money from another to pay it. (p. 249.)

COUNTIES—Borrowing Money for Current Expenses.—County officials have no authority to contract for a loan to defray current expenses of the county, although the loan is contracted to be paid in the current year, and is made with the understanding that it shall be paid from the anticipated revenues of that year. (p. 250.)

COUNTIES—Liability for Unauthorized Debts.—Where county officials borrow money in the face of a constitutional inhibition, but apply it beneficially to authorized municipal purposes, the county is liable to the lender as for money had and received. (p. 250.)

COUNTIES—Liability for Unauthorized Debts.—Where the constitution of a state forbids not only the borrowing of money by a county but also the incurring of the liability which is discharged by the money borrowed, the lender is without remedy against the county to recover his money in any form of action. (p. 254.)

COUNTIES — Unauthorized Loan — Subrogation.—Where a county issues a warrant to pay a lawful liability incurred for current expenses, and thereafter procures another to pay it out of a loan that he makes to the county, the lender, upon a disaffirmance by the county of the illegal loan, is subrogated to the rights of the warrant-holder. (p. 255.)

COUNTIES—Enjoining Payment of Warrants.—When the legality of a portion of county warrants contending for payment is in issue, and the warrants aggregate an amount in excess of the sum in the treasury raised from the revenues of the year in which the liabilities were incurred, equity will, by injunction, impound the fund in the hands of the treasurer until it is judicially ascertained to whom and in what proportions the fund should be appropriated. (pp. 255, 256.)

Joseph B. Wall and Rosser & Brandon, for the plaintiffs in error.

E. M. Smith, Olin J. Wimberly and J. D. Kilpatrick, for the defendants in error.

802 EVANS, P. J. This was a petition by the Jackson Banking Company, a corporation, against Butts county, the county commissioners, and the treasurer of the county, for injunction and other relief. In the petition it was alleged that the Jackson Banking Company (hereafter called the bank) loaned to the county, at different dates between February and October, 1906, certain sums of money, and these loans were evidenced by notes, copies of which were set out. The money was borrowed for the purpose of providing present funds for the immediate payment of county warrants, in anticipation of taxes which could be legally levied; it being the agreement between the county and the bank that the notes were to evidence the sums advanced by the bank during the current year, and they were made payable at times when it was anticipated the taxes would be in the treasury. The money so advanced upon these notes was placed to the credit of the county on the bank's books. It was agreed that the money was to be actually paid by the bank to the holders of the county warrants, and pursuant to the agreement the bank paid the money to the warrant-holders and stamped the warrants paid. A list of the warrants was attached to the petition. In a few instances some money was paid upon the check of the treasurer, these checks actually representing the amounts of warrants turned over to the treasurer; and the treasurer having no funds to meet the checks, they were used in lieu of the warrants. It was agreed that the county would

levy a sufficient tax to cover the amounts so actually advanced to defray legitimate expenses of the county. It was alleged that the present board of commissioners denied liability on the notes and refused to reimburse the bank for the money paid by it to warrant-holders; that the fund in the hands of the treasurer ⁸⁰³ was derived from taxes levied for the year 1906, and was sufficient to pay the bank for the moneys expended for the county's benefit; that the commissioners had issued other warrants on this fund to pay claims of inferior dignity to the bank's claim, and that the funds in the treasury were insufficient to pay the demands of the bank and other warrant-holders. The prayers were, for judgment on the notes, but, if the contract of loan be declared illegal, that the bank be decreed the owner of the warrants which it paid, and be subrogated to all the rights of the several warrant-holders; for mandamus; and for injunction to restrain the disbursement of the fund in the treasury to warrants of inferior dignity, and to restrain the payment of any warrant so as to reduce the funds below the bank's claim. The court passed an order calling on the defendants to show cause why the writ of injunction should not issue, and granted an ad interim restraining order. The defendants showed cause by way of demurrer and answer, wherein the liability of the county was denied. On the interlocutory hearing an injunction was granted, and the present bill of exceptions is taken to this judgment.

1, 2. The liability of the county on the notes is predicated on the theory that the governing officials of a county, in the county's behalf, might lawfully contract for a loan of money to be used in defraying current expenses in anticipation of the collection of the annual county taxes. Is this financial policy forbidden by the fundamental or statute law of this state? Article 7, paragraph 7, section 1 of the constitution is as follows: "The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to

be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at ⁸⁰⁴ the time of the adoption of this constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation." In the well-considered case of *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907, this court laid down the following comprehensive definition of the word "debt" as used in this paragraph of the constitution: "Taking into consideration all of the provisions of the constitution which deal with this subject of debts to be incurred by the public, and taking into consideration the matters of public history above referred to, we are brought to these conclusions as to what was the intention of the framers of the constitution in the matter of debts to be incurred by municipal corporations: 1. The word 'debt' is not to be construed in its broad and unrestricted sense, of a liability by one person to pay money or other thing of value to another. 2. A liability for a current expense can be incurred by a municipal corporation for any one year, provided there is, at the time of incurring the liability, a sufficient sum in the treasury of the city which may lawfully be appropriated to the payment of the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year; and such a transaction would not create a debt within the meaning of that word as it is used in the constitution. 3. It was the purpose of the constitution to provide a system of finance for subordinate public corporations, under which there should be each year contracts made for the expenses of the year, and these were to be paid out of moneys arising from taxes levied during the year—that is, that each year's expense should be paid by taxes levied during the year, and no item of expense was to be paid except out of the taxes levied during the year in which the contract for such expense was made. 4. Any liability which was not to be discharged by money already in the treasury, or by taxes to be levied during the year in which the contract under which the liability arose was made, is a debt within the meaning of the constitution, and cannot be incurred without the preliminary sanction of a popular vote, unless it be for a temporary loan to supply casual deficiencies of revenue." The fiscal policy of counties prescribed and enjoined by the constitution is that all law-

ful liabilities must be paid out of the revenues raised for the year in which the liabilities are incurred. No departure from this plain and express course is allowable except in the two ⁸⁰⁵ instances specified, viz., in cases of loans to supply a casual deficiency of revenue, and in cases of debts created by authority of a previous plebiscite vote. This system of finance is entirely opposed to the ruinous policy of postponing the legitimate burdens of the present to the care of posterity. The creation of a liability causes little concern if its payment may be deferred for generations yet to come. But when public officials charged with the administration of the county's affairs are confronted with the proposition that they must annually levy a tax to meet every item of expense of the current year, they are likely to be less extravagant and prodigal in incurring liabilities.

The plain and obvious import of the words employed in this provision, according to their common understanding, is that a county, without a preliminary vote of sanction, should never be permitted to borrow money except to supply a casual deficiency in revenue. Not only is this the plain significance of the words in this clause, but a reference to the proceedings of the constitutional convention discloses that the framers of the constitution intended such a construction. One of the aids in constitutional construction is an examination of the proceedings of the constitutional convention. It is admitted that ordinarily not much assistance may be derived from such examination, since the proceedings may not clearly point out the purpose of the particular provision; and besides, the constitution obtains its force from the people, and not the convention: Cooley's Constitutional Limitations, 3d ed., 389. But where the proceedings show the positive and unmistakable intent of the framers of the instrument that the particular phraseology shall not be extended beyond its plain meaning, corroborative force is given to the conclusion that the people acted on this construction, and ratified the instrument in the belief that the words were used in a sense obvious to the common understanding. When this paragraph was reached in the report of the committee on final revision, it contained an exception allowing an increase of indebtedness to an amount not exceeding two per centum upon the assessed value of the taxable property, but these words were stricken, and in their stead were inserted the words "except for a temporary loan or loans to supply casual deficiencies of

revenue, not to exceed one-fifth of one per cent": Journal Const. Con. 315. This is an emphatic declaration that it was never contemplated that county or ⁸⁰⁶ municipal officials should ever borrow money without the sanction of a plebiscite vote, except in one instance only, viz., to supply a casual deficiency of revenue. While it is permissible, under the interpretation of the Dawson Waterworks case (106 Ga. 696, 32 S. E. 907), for a county with an empty treasury to incur a liability for a current expense, to be discharged from the funds raised by taxation during the current year, and yet not create a debt, it does not follow that a contract for the loan of money to pay such liability is not a debt in the meaning of the constitution. There is a fundamental difference between incurring a liability to one person and borrowing money from another to pay it. As is said in 2 Daniel's Negotiable Instruments, fifth edition, section 1530: "It may be convenient to do so, but it cannot be necessary. . . . In the one case the application of the credit is secured to the advancement of an authorized object, while the money borrowed is liable to be lost, to be squandered, or to be diverted to illegitimate purposes." The power to raise money by taxation to meet current expenses does not imply a power to borrow money for that purpose: *Dent v. Cook*, 45 Ga. 323; *Wood v. Commissioners of Greene Co.*, 60 Ga. 556.

Public officials are special agents with limited powers. When it is sought to bind a county by the undertaking of its officials, its liability on the contract must be founded on the authority of the official to make it. The official or officials in charge of the county's affairs have authority to repair a bridge on the public highway. They may lawfully contract to have it done. They have authority to issue a warrant to the contractor on the county treasury for the amount of the repairs, and they have authority to levy a tax sufficient to supply the treasury with the necessary funds with which to pay the warrant. It was never contemplated by our organic law that current expenses were to be met with borrowed money, and that the county authorities might go into the market from time to time and negotiate loans and borrow money to supply the till of the county treasury, except in the case of a casual deficiency. Such a scheme is wholly at variance with the inhibitory provision against creating debts. The constitutional scheme of defraying current expenses by

taxation excludes the idea of paying them in any other way: *Wells v. Salina*, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759. Moreover, a county is a political subdivision of the state; a unit of territory in which local self-government obtains. The power of taxation is ⁸⁰⁷ intended to supply the necessary funds, and the county must look to this source until power to borrow money is conferred: *Mayor of Nashville v. Ray*, 19 Wall. 468, 22 L. ed. 164; 11 Cyc. 502; 7 Am. & Eng. Ency. of Law, 2d ed., 932; *Swalkhammer v. Town of Hackettstown*, 37 N. J. L. 191. It does not matter that the loan is contracted to be paid in the current year, and was made with the distinct understanding that it was to be paid from the anticipated revenues of that year. It is the nature and not the form of transaction which the constitution condemns. The county is prohibited from borrowing money to pay current expenses; the form of the contract cannot override the fundamental law: *Hall v. County of Greene*, 119 Ga. 253, 46 S. E. 69.

In all the cases considered by this court since the adoption of the constitution of 1877, the borrowing of money by counties (not to supply a casual deficiency of revenue) has been treated as forbidden by the constitution: *Mason v. Commissioners of DeKalb County*, 104 Ga. 35, 30 S. E. 513; *Hall v. Greene*, 119 Ga. 253, 46 S. E. 69; *Town of Wadley v. Lancaster*, 124 Ga. 354, 52 S. E. 335. We therefore think that the contract of loan, in pursuance of which the notes to the defendant in error were executed, is violative of article 7, section 7, paragraph 1 of the constitution, and that the notes are not enforceable against the county.

3, 4. Counsel for plaintiffs in error contend that the illegality of the notes pervades the whole transaction, and bars a recovery of the money, even though beneficially applied to a lawful purpose. To this contention we cannot give our assent. It is very generally held that counties and municipal corporations are liable for money had and received by them and applied beneficially to their authorized objects, although the contract by which the money was obtained was unauthorized by law: *Allen v. LaFayette*, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497; *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. Rep. 1055, 30 L. ed. 176; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442, 27 L. ed. 238; *Dillon on Municipal Corporations*, sec. 126; 20 Am. & Eng. Ency. of Law, 2d ed., 1158; *Luther v. Wheeler*, 73 S. C. 83, 52 S. E.

874, 4 L. R. A., N. S., 746. The principle of liability rests upon the theory that the obligation implied by the law to pay does not originate in the unlawful contract, but arises from considerations outside of it. In ascertaining the quantum of liability the amount of the loan is not taken into account, but the measure of recovery is the money actually applied to lawful municipal or county uses. The obligation to account for money received by the county, and actually devoted to lawful purposes, rests upon the ⁸⁰⁸ broad principle of common honesty, which will not permit the county to retain the benefit of money lawfully applied to its use, and at its request, simply because the county lacked the power to borrow the money. There are cases decided by courts of high repute which maintain the opposite doctrine. In reviewing these cases, Woods, J., in *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A., N. S., 746, very clearly demonstrates their unsoundness. He said: "The view expressed in these and other cases is that to allow a recovery for money had and received, while denying the power to corporate officers to make a valid contract to repay borrowed money, would be, (1) to repudiate such a contract in the abstract while ratifying and giving it full effect in the concrete, and (2) to raise an implied contract to repay where there is no power to make an express contract. A statement of the basis of the action for money had and received, we venture to think, will show that these arguments are not sound. Express contracts and contracts implied in fact depend upon the will of the parties to be bound, indicated in the one case expressly in some form recognized by law, and in the other by circumstances from which assent may be inferred as a conclusion of fact. Quasi contracts, or contracts implied in law, are obligations imposed by law as duties quite independent of the assent of the party held to be bound, and often in spite of his earnest dissent. In an action on an express contract, or a contract implied in fact, the measure of the recovery is ordinarily fixed by the promise. In an action depending on the obligation or duty called quasi-contract, the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff. If a recovery were allowed against a municipal corporation on a note for money borrowed, the judgment must be for the amount of the note, however large,

and although the money may have been squandered. But in an action against a town for money had and received, the question is not what the claimant has parted with to officers who were not authorized to take his money for the town, or what they have promised him, but how much has the town been benefited. If the money was squandered, there can be no recovery; if it were used extravagantly for buildings or enterprises not reasonably necessary for municipal purposes, there can be no recovery beyond the actual benefit. This view, it will be seen, leaves no ⁸⁰⁰ room to say that a promise to pay back money is implied where no valid contract can be made, or that allowing any recovery for money had and received subjects the town to the same peril as to admit the unrestricted right of a municipal council to borrow money." While the action for money had and received depends not upon a contract express or implied in fact, it is bottomed on the right of the county to incur the liability to discharge which the money was applied. The constitution, article 7, section 7, paragraph 1, forbids the creation of any new debt without a vote of the people; but as this paragraph of the constitution was construed and interpreted in the Dawson Waterworks case (106 Ga. 696, 32 S. E. 907), a liability for an annual current expense is not a debt in the sense used in this provision of the constitution, if a sufficient sum of money to discharge the liability can be lawfully raised by taxation during the current year. This differentiation between the debts which come within the operation of the constitutional provision and liabilities for legitimate current expenses to be paid out of the taxes which can be properly levied during the year in which the liability was incurred, is neither artificial nor arbitrary. This constitutional provision must be construed in the light of the history of the law on the subject in this state, and the long-established public policy of regulating the governmental affairs of a county. From the earliest times it has been the declared policy of this state that each year shall be a fiscal unit, and that current expenses should be met by a levy of taxes of the same year that the expenses were incurred. The system of taxation originally devised, and which still remains in force in this state, is that taxes shall be levied in the late summer or fall and collected in the latter part of the year. At the time of the adoption of the constitution of 1877 the taxpayer was given until December

20th in which to pay the taxes assessed for that year; so that the revenue derivable from taxes was not available until near the close of the year. In the meantime it is necessary that the governing officers of the county should discharge the duties imposed by law of keeping up the bridges of the county, caring for paupers, keeping the public buildings in repair, providing for the expenses of courts, and for other necessary current expenses of running the affairs of the county. There was no authority of law for the county to borrow money with which to meet these expenses. The alternative, therefore, was presented that, as each year's expenses ^{\$10} had to be paid out of the taxes of that year, the county must either incur a liability for these current expenses, or there must be a complete cessation of public activities and governmental functions until the taxes were collected. There is no provision in the constitution of 1877 designed to meet this contingency; and hence we may conclude that the inhibition against creating any new debt was never intended to prevent the county from contracting liabilities for current expenses in anticipation of its annual revenue, and which were to be paid from that revenue. This paragraph of the constitution, therefore, contains no prohibition against incurring a liability for a proper current expense, provided the sum total of such liabilities does not require an unreasonable tax or exceed the constitutional tax limit. If a legal liability for a current expense is incurred, and the county issues a note or a bond to pay it, the note or bond is void. The creditor cannot enforce such invalid note or bond by suit, but he can enforce the payment of the county's primary liability to him. If the county received the money borrowed by its officers without authority, and applied it to the purchase of property which it was authorized to buy and hold, or to defraying any other liability which it could legally incur, the lender would stand in the same relation to the county as the person to whom his money was paid. In this case, the bank was not an officious intermeddler. Its payment of the warrants was not an illegal act. The statute declares that county warrants are negotiable by delivery, subject to the treasurer setting off any sum that the payee may be due the county at the date of the warrant: Pol. Code, sec. 467. Without any request or arrangement of any kind the bank could have retained the warrants which were surrendered to it by the

warrant-holders, and collected them from the county. The loan contract was void in its totality. Hence the money paid the warrant-holders was the bank's money. To illustrate that the bank's right to be reimbursed for money actually applied to legal current expenses exists independently of the illegal contract of loan, let us assume that the transaction was this: The bank had purchased these warrants, and the county borrowed from the bank a sum of money, a part of which was used in paying for these warrants, and the balance turned over to the county authorities and squandered by them. The loan was illegal; but can it be asserted in a court of conscience that the county was relieved, by the illegal contract of ^{\$11} loan, of its honest obligation represented by the warrants? The county cannot wipe out its liability on its warrants by paying them with the warrant-holder's money. In the instance supposed the bank purchases warrants before the loan. In the present case the bank paid for the warrants with the money for which the notes were given. We recognize the soundness of the rule that where the constitution of a state forbids not only the borrowing of the money but also the incurring of the liability which was discharged by the money borrowed, the lender is without remedy against the county to recover his money in any form of action, legal or equitable. But in reaching the conclusion which we have in this case, it is upon the construction of the constitution that this paragraph does not prohibit the incurring of a liability for legitimate current expenses to be paid, or which may lawfully be paid out of the taxes of that year. We are but applying to this paragraph the construction enunciated in the Dawson Waterworks case (106 Ga. 696, 32 S. E. 907). In that case the waterworks company contracted with the city of Dawson to supply it with water for a series of years. This court pronounced the contract void, because forbidden by the constitution; but when the city elected to repudiate the contract, it was held that the city must pay for the water consumed previously to the repudiation of the contract. The right of equitable relief for the recovery of money actually paid to a county, and by it afterward used in defraying actual and legitimate expenses, which were a proper charge upon the treasury, has been recognized in several cases decided by this court: *Milburn v. Glynn County*, 109 Ga. 473, 34 S. E. 848; *Johnson v. Pinson*, 126 Ga. 121, 54 S. E. 922; *Hall v.*

Greene County, 119 Ga. 253, 46 S. E. 69; *Mason v. Commissioners of DeKalb County*, 104 Ga. 35, 30 S. E. 513. While it may be true that what was said on this subject in these cases may have been to some extent obiter dicta, it illustrates that when other phases of this constitutional provision were being construed by the court, the proposition under discussion was recognized, and the decisions made with regard thereto.

The only remaining question is whether, under the pleadings and evidence submitted on the interlocutory hearing, the treasurer should be enjoined from paying out the county funds in his hands, raised from taxes levied for the year 1906, until it may be judicially determined how that fund should be distributed. The petition was filed in January, 1907, and on the interlocutory hearing in March ⁸¹² following it appeared that the treasurer had in his hands a certain amount of money raised from the taxes of 1906, and that this fund would likely be increased by a stated amount from the collection of the balance of the taxes assessed for that year. The amount in hand, together with the expected accretion, was insufficient to pay the various county warrants which had been issued by the county commissioners for liabilities incurred during the year 1906. It appeared from the evidence that an attack was made upon some of the warrants, because they were issued for liabilities which were not chargeable against the taxes of the year 1906, and also that some of the warrants were issued to defray expenses improperly and illegally incurred. Some of the warrants were issued prior to December 1st, and many were issued subsequently. The treasurer had not kept separate the various special funds as directed by the statute. The code provides that warrants must specify the fund on which they are drawn, and that they shall be paid according to certain priorities and proportions: Pol. Code, secs. 361, 463-466. As we have reached the conclusion expressed in a former part of this opinion that the bank is subrogated to the rights of the holders of the warrants discharged with its money, and as the constitutional scheme contemplates that the liabilities of a particular year should be paid from the taxes levied for that year, under the facts developed on the interlocutory hearing a case is presented for the intervention of a court of equity by the writ of injunction to impound the fund in the hands of the treas-

urer until it may be judicially ascertained to whom and in what proportions this fund should be appropriated.

Judgment affirmed.

All the justices concur, except Holden, J., who did not preside.

Constitutional Restrictions on the Power of Municipalities to contract indebtedness are discussed in the note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229. That persons dealing with municipal corporations must take notice of the constitutional limit on their power to incur debts, see *Smith v. Broderick*, 107 Cal. 644, 48 Am. St. Rep. 167; *National Life Ins. Co. v. Mead*, 13 S. Dak. 37, 79 Am. St. Rep. 876. It has been affirmed that under a contract for the supply of water, void because incurring an indebtedness in excess of the limit allowed by the constitution, any obligation flowing therefrom is void also, and no liability to pay for water furnished under such contract is imposed upon the city by the fact that the city council has appropriated a particular sum to pay therefor: *State v. Helena*, 24 Mont. 521, 81 Am. St. Rep. 453.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

CUNNINGHAM v. BANK OF NAMPA, LTD.

[13 Ida. 167, 88 Pac. 975.]

ATTACHMENT OF TRUST FUNDS—Deposit in Bank—Knowledge of Trust.—If an attorney collects money as collecting agent for his clients and deposits it in a bank in his own name as “atty.,” and the bank has no actual knowledge of the trust relation existing and of the character of the fund so deposited, it is fully justified in paying the money over to an officer levying an attachment in an action for the collection of a debt against such attorney. (p. 259.)

ATTACHMENT OF TRUST FUNDS—Deposit in Bank—Knowledge of Trust—Right to Recover.—If an attorney collects money as collecting agent for his clients and deposits it in bank in his own name as “atty.,” and it is afterward attached and levied on for his debt, he, as trustee for such clients, may maintain an action against the bank, having notice of the character of the fund, and against the officer levying the writ, to recover the money for the use and benefit of the persons beneficially interested therein. (p. 260.)

ACTIONS—Proper Parties Plaintiff.—If an attorney collects money as collecting agent for his clients, depositing it in bank and afterward bringing an action as trustee for his clients to collect such money from the bank, the beneficiaries are proper parties plaintiff. (p. 261.)

E. M. Wolfe, for the appellant.

Hawley, Puckett & Hawley and F. Estabrook, for the respondent.

¹⁶⁹ AILSHIE, C. J. This action was instituted by the plaintiff Richard Cunningham as trustee for a number of persons named in the complaint, against the Bank of Nampa, Ltd., a corporation, J. C. Nichols, sheriff of Canyon county,

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and the United States Fidelity and Guaranty Company, a corporation, bondsman for the sheriff, to recover the sum of nine hundred and thirteen dollars and twenty-four cents, the amount of damages claimed to have been sustained by the cestuis que trustent. The defendants demurred ¹⁷⁰ to the complaint and the demurrer was sustained. Plaintiff thereupon appealed from the judgment. The facts disclosed by the complaint are substantially as follows:

That Richard Cunningham is an attorney at law, and as such has collected the money sought to be recovered from different persons on notes and accounts in favor of his several clients for whom he was acting as agent or trustee in the collection and transmission of the proceeds of the several notes and accounts. He alleges that he had an account with the defendant bank in which he deposited all the moneys collected by him for his clients in the name of "Richard Cunningham, Atty." It is alleged that this was a special account of trust funds against which he checked in payment of the various clients whose moneys he had therein deposited. It is charged that the bank had knowledge and notice of the nature and character of the fund thus deposited, and that the same was not the money or property of Cunningham. During this time, while the money was still in the bank, one Henry W. Leman, who held a judgment against Cunningham in the state of Nebraska, brought an action on such judgment in Ada county, Idaho, and caused a writ of attachment to be issued against the property of Cunningham, and delivered that writ to the sheriff of Canyon county, who served it on the defendant bank and attached the fund and account therein held in the name of "Richard Cunningham, Atty." Plaintiff Cunningham thereafter demanded in the name of his alleged cestuis que trustent the delivery of the money theretofore deposited and upon which the writ of attachment had been levied. The bank refused to turn over the fund and a like demand was made of the sheriff, who also refused, and thereupon this action was commenced. The bank demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. Nichols and the guaranty company demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and also upon the ground that there was a misjoinder of parties defendant, in that the bank was not a proper party defend-

ant in the action. The demurrers were ¹⁷¹ sustained and judgment was entered in favor of the defendant.

The only question to be determined by us is: Does the complaint state a cause of action? For the purpose of determining the question before us, all the material allegations of the complaint must be taken as true. It is a fundamental principle both of law and justice that the debtor's property, and his property alone, is liable for the payment of his debts. It is conceded that Cunningham was indebted to the attaching creditor. If the money and account in the defendant bank was the property of Cunningham, it was unquestionably liable for the payment of his debt and subject to attachment therefor. If it was not his money and property, it is equally clear that it was not liable for his debt. If Cunningham after collecting this money had taken it in kind as collected to the bank for the purpose of purchasing drafts to his several clients for remittance to them, and while the money was on the bank counter and prior to the receipt of the draft and delivery of the money to the bank, it had been attached by the sheriff, it would not have been seriously contended, we apprehend, that the money could be held under this attachment for the payment of a debt owed by Cunningham. The deposit of the money by Cunningham with the bank could give him no better title to it than he had before the deposit, and certainly an attaching creditor cannot, through his attachment process, acquire any better title to the property than the debtor has: *Thomas v. Hillhouse*, 17 Iowa, 67.

Some confusion has been injected into the case by reason of a discussion as to the liability of the bank to pay the fund to Cunningham upon his check. The word "Atty." after the name of "Cunningham," as the account was entered in the bank, was a mere *descriptio personae*, and did not serve in any manner to disclose the name of his principals or the *cestuis que trustent*, and as between Cunningham and the bank it was unquestionably the duty of the bank to pay the money to Cunningham upon his demand or the presentation of his check at any time prior to the service ¹⁷² of the writ of attachment. It is also equally clear that if the bank had no actual knowledge of the trust relation existing and the character of the fund so deposited, it would have been fully justified in paying the money over to the sheriff upon the service and levy of the writ of attachment.

If it should appear that the bank did so, and that it had no other knowledge or information as to the character and ownership of the fund except the designation of "Atty." after the name of the depositor, it will have established a complete defense to the action, and would be entitled to release and discharge from further liability. But the question as to the liability of the bank to Cunningham personally, and of the relation the bank itself sustained toward the fund, cannot be taken as the test of responsibility in the present action. The plaintiff in this action sues, not in his individual capacity, but as trustee for the several clients interested in the fund. He alleges that he has no interest in the money and account other than that of transmitting and delivering the same to his several clients in the amounts designated in his complaint. If, previous to the demand and the commencement of this action, the bank had in good faith parted with the fund in the due course of legal proceedings and under the belief and understanding that the money was the property of Cunningham, as it would have had a right to believe in view of the nature of the deposit, then and in that case its liability had ended; but if it still holds the fund at the time it is notified of the true and beneficial ownership therein, as soon as that ownership and right of possession is established, it will become the duty of the bank to pay the money in accordance with the true state of facts and condition of the fund: *Des Moines Cotton Mill Co. v. Cooper*, 93 Iowa, 654, 61 N. W. 1084; *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. ed 693; *Van Alen v. American Nat. Bank*, 52 N. Y. 1.

It has been argued that the bank was improperly joined as a party defendant. We do not think this ground of demurrer well taken for the reasons above stated. If upon the trial the deposit should appear to be still in the hands¹⁷³ of the bank, the bank will be liable to account to the successful party therefor. If, on the contrary, the fund is shown to have passed in good faith from the hands of the bank, then the bank will no longer be liable.

It has been argued that the plaintiff Cunningham could not maintain this action as trustee for the several parties named without also joining the cestuis que trustent in their individual capacities. The case coming here on demurrers, and that question not having been raised by the demurrers or in any other proper manner, we are not called upon to

decide that question. It is clear, however, that the several beneficiaries named are proper parties plaintiff (First Nat. Bank v. Hummel, 14 Colo. 259, 20 Am. St. Rep. 257, 23 Pac. 986, 8 L. R. A. 788; Rev. Stats., secs. 4090, 4092), and it would seem upon first blush that they are necessary parties.

As we view this case, the demurrer should have been overruled. None of the grounds alleged in the demurrers were well taken. The judgment will be reversed and the cause remanded for further proceedings in harmony with the views herein expressed. Since the question of parties plaintiff will undoubtedly arise again in the lower court, we suggest at this time that the plaintiff be allowed, if he so desires, to amend his complaint by bringing in each cestui que trust in his individual capacity as a coplaintiff.

Costs are awarded in favor of the appellant.

Sullivan, J., concurs.

The Duty and Relation of a Bank to trust funds deposited with it are discussed in the note to Central State Bank v. Spurlin, 82 Am. St. Rep. 520; and in the recent cases of Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 110 Am. St. Rep. 844; Brookhouse v. Union Pub. Co., 73 N. H. 368, 111 Am. St. Rep. 623, and cases cited in the cross-reference note thereto.

PARKS BROS. & CO. v. NEZ PERCE COUNTY.

[13 Ida. 298, 89 Pac. 949.]

INTERSTATE COMMERCE—Termination of Interstate Transportation—Taxing Power of State.—If goods consisting of small packages are packed in one large box and shipped from one state, consigned to the shippers in another, and there received by them from the carrier at their destination, where the large box is broken open, and the small packages are delivered to purchasers in accordance with previous orders, the goods, after the large box is broken open and delivery begins, cease to be the subject of interstate transportation, and become a part and parcel of the property of the state, subject to taxation under its revenue laws. (p. 265.)

INTERSTATE COMMERCE—End of Interstate Transportation—Original Package—Taxing Power.—If goods consisting of small packages are packed in one large box and consigned to the shipper in another state, the original package is the large box in which the goods imported are shipped, and when such box is opened at the point of destination for the sale and delivery of the separate parcels contained in it, each parcel of the goods loses its distinctive character as an import or subject of interstate commerce, and becomes

property subject to taxation by the state as other like property situated within its limits. (p. 266.)

INTERSTATE COMMERCE—End of Interstate Transportation—Original Package—Taxing Power.—If goods consisting of small packages are packed in one large box consigned to the shipper in another state, the original package is the large box in which the imported goods are shipped, and after it is received by the owners at its destination and opened and the smaller packages removed therefrom for delivery to customers it ceases to be an article of interstate commerce, and is subject to the taxing power of the state where found. (p. 266.)

Anderson & Nickerson and V. W. Hasbrouck, for the appellants.

B. S. Crow, for the appellee.

³⁰⁰ AILSHIE, C. J. The appellants are wholesale merchants, doing business in the city of San Francisco and receiving orders through their agents and by mail for teas, coffee, spices, etc., which they ship to their own address and there receive the goods and distribute them to the purchasers and collect the purchase price therefor. The facts and history of this transaction are fully set forth in the findings made by the trial court, which are as follows:

“The court finds as a matter of fact that the property assessed to Parks Brothers & Co. of San Francisco, Cal., was consigned to Parks Bros. & Co., in Nez Perce County, ³⁰¹ was received by Parks Bros. & Co., said plaintiff, in said Nez Perce County, and was in said county opened by Parks Brothers & Co., in Nez Perce County, the contents of the original packages being separated and distributed to different parties in said Nez Perce County; that while said property was in the care, control and custody of said Parks Brothers & Co., in Nez Perce County, it was assessed by the assessor of said county.

“The court also finds that Parks Bros. & Co. are and were on the 12th day of August, 1905, wholesale grocers residing at and doing business in the City of San Francisco, State of California, and that they sold their goods through an agent who showed the purchasers samples and took orders for the goods, which orders were sent to plaintiff's house in the city of San Francisco, and there filled according to said orders; that the said goods were shipped to Ilo in Nez Perce County, consigned to the plaintiffs, and there received by their agent and delivered to the purchasers; that no goods were shipped

except those which had previously been ordered, and that no other goods were sold at the place of delivery than those which had previously been ordered, and that the said goods were consigned to Parks Bros. & Co. for the only purpose of examination by the purchasers and collection by plaintiff of the amount to be paid; that the goods consisted of teas, coffees and spices, and the small packages were shipped together in a large box, as the packages for each individual being done up separately, and the large boxes containing small packages were broken at Ilo, the place of destination, and the contents delivered to purchasers in accordance with the orders previously given and filled in San Francisco; that the said property was assessed while in the care, control and custody of Parks Bros. & Co. in Nez Perce County at Ilo, the place of destination, on the 12th day of August, 1905, by the assessor of Nez Perce County."

This litigation grows out of the fact that after the receipt of the goods at Ilo, in this state, and while the plaintiffs ³⁰² were delivering the goods to the purchasers, the tax collector of Nez Perce county assessed the property to appellants and demanded payment of the taxes under the revenue laws of this state.

There is no question as to the regularity of the assessment, provided the property had become a part of the taxable property of this state and was not protected by the commerce clause of the constitution of the United States and the act of Congress regulating interstate commerce. The appellants, Parks Bros., place their sole reliance on the contention that the taxation of these goods was a violation of sections 8 and 10 of article 1 of the constitution of the United States and the acts of Congress regulating commerce between states. The trial court, after making findings of fact, as hereinbefore set out, concluded as a matter of law that the property in question was subject to taxation within this state, and was properly assessed against the plaintiffs.

Considerable argument has been made upon the question as to where and when the sale of these goods took place, whether in California or Idaho. As we view the case, however, that question is of but slight importance. It is not out of place, though, to observe that the title to the property clearly rested in the vendors. They were still in possession and would retain the title until the purchase price was received by them. While there undoubtedly existed a

contract between the plaintiffs and purchasers looking to the sale of this property, the transaction had not yet been closed, and the sale had not yet been consummated.

In *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586, the question arose as to where a sale of certain liquors had taken place, whether in the state of New York or Vermont. O'Neil had received orders by mail from various customers in Rutland, Vermont, and he filled these orders by shipping jugs of liquor by C. O. D. express to the various purchasers in Vermont, with instructions to the express company to deliver the goods if the purchaser accepted and paid for them; if not, to hold the goods and notify the consignor. In considering this question, the supreme court of Vermont ³⁰³ said: "The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale, therefore, remaining inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this state."

That case was taken to the supreme court of the United States on a writ of error (*United States v. Sanges*, 144 U. S. 310, 12 Sup. Ct. Rep. 609, 36 L. ed. 445), and the writ was dismissed by the supreme court upon the ground that no federal question was involved.

But to our minds, the decisive question to be determined in the case at bar is, Had the property shipped from San Francisco ceased to be property in transit and become a part of the mass and bulk of the property of this state? If it had, then it was subject to taxation under the revenue laws of this state. In view of the facts as found by the trial court, it occurs to us that the property was no longer the subject of interstate transportation. It had passed from the ³⁰⁴ hands of the carrier back to the hands of the owners, the Parks Bros. It was no longer in the "original package" in which it was shipped, but, on the contrary, those packages had been broken and separated, and the distribution was in process when the officer levied this tax assessment on the property.

It appears that the vendors would put up the whole order of one purchaser in a separate package, which might be small or large, and mark it with the name of the purchaser, and then when all the packages were done up that were to be sent to one shipping point, they would pack a large number of the smaller packages in one box or case for shipment. The question has arisen in this case as to which should be considered the "original package"—the smaller package intended and designed for the individual purchaser, or the entire box as the same was shipped from San Francisco to Ilo, Idaho. We think this question has been fully answered by the highest court in the land vested with jurisdiction to determine that question, and such determination has been adverse to the contention made by the appellants. A very interesting and instructive case on the subject is that of *May v. City of New Orleans*, 51 La. Ann. 1064, 25 South. 959. In stating the question under consideration in that case, Mr. Justice Blanchard said: "The question, then, which the case really presents is, What is the 'original package'? Is it the package in which the goods are put up for the convenience by the foreign manufacturer, or is it the case, the box, the covering in which the goods so put up by the manufacturer are packed for shipment? Is the manufacturer's package the original package, in the legal interpretation, or must that be held to be the original package which is delivered to the carrier for transportation to the desired destination? If the package put up by the manufacturer be the original package, then plaintiffs' objection to the assessment complained of is well taken. If the case or box in which

the goods are placed for shipment be the original package, then their case fails." After reviewing and considering a number of authorities dealing with the subject of ³⁰⁵ "original packages," the learned justice says: "Other authorities of the same tenor might be cited, but these suffice to support the contention of the defendant that the 'original package,' in this case, must be held to be that in which the goods were shipped to and received by the plaintiffs, and not the smaller packages put up by the manufacturer, and packed within the case delivered to the carrier."

This case was taken on writ of error to the supreme court of the United States (*May v. City of New Orleans*, 178 U. S. 496, 20 Sup. Ct. Rep. 976, 44 L. ed. 1165), and after considering and approving the views announced by the Louisiana court, the supreme court said: "In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits. The tax here in question was not in any sense a tax on imports, nor a tax for the privilege of bringing the things imported into the state. It was not a tax on plaintiff's goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels, and therefore subject to be taxed as like property, in the same condition, that had its origin in this country."

It follows from what has been said in *May v. City of New Orleans*, 178 U. S. 496, 20 Sup. Ct. Rep. 976, 44 L. ed. 1165, and other cases to the same effect, that the original package in the case at bar consists of the box or case as it was shipped from California to Idaho. After that box or case was received by the owners at its destination, and opened and the smaller packages removed therefrom, it ceased to be an article of interstate commerce, and was subject to the taxing power of the state where found. The facts and circumstances of this case make it quite different from a case where the goods were shipped C. O. D. and were delivered by the carrier to the purchaser at the depot or ³⁰⁶ warehouse, and the purchase price then and there received by the carrier for and on behalf of the vendor.

Appellants have cited and relied on *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441, 24 Sup. Ct. Rep. 151, 48 L. ed. 254. That was a case where Sears, Roebuck & Co., of Chicago, had sold a sewing-machine to a purchaser in North Carolina on written mail order from the purchaser. The machine was shipped from Chicago C. O. D., and upon the receipt thereof at its destination in North Carolina, the purchaser paid the purchase price to the agent, and before the purchaser had received the machine, the sheriff notified the agent that the vendors would have to pay a license before delivering the machine, and on their refusal to do so, he seized the property. The supreme court of North Carolina sustained the action of the sheriff and held that the license tax was properly collectible: *Broom v. Broom*, 130 N. C. 562, 41 S. E. 673. On writ of error to the supreme court of the United States, the judgment of the supreme court of North Carolina was reversed, the court holding that the action of the North Carolina authorities amounted to levying a tax on interstate commerce. This latter decision seems to have rested on the principle announced in the case of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128, wherein the court said: "It is only after the importation is complete and the property imported is mingled with and becomes a part of the general property of the state by the importer that the state regulations can act upon it."

In *Re Kinyon*, 9 Idaho, 642, 75 Pac. 268, this court had under consideration the question of the taxing power of the state where it affects interstate commerce, and reviewed most of the authorities cited in the case at bar. In that case that court said: "It should be observed, however, that a distinction has been made where the goods or property at the time of the sale are within the state and under the control and care of the agent or solicitor. In such cases it is said that both the property and the business or occupation are within the jurisdiction of the state, and therefore subject to its regulation and control, and that any transaction with reference ³⁰⁷ thereto does not look to interstate commerce for the carrying out and execution of the same."

In support of that statement, we cited the case of *Emert v. State*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, 39 L. ed. 430.

We conclude in the case under consideration that the property had ceased to be the subject of interstate commerce, and no longer in the "original packages," but had be-

come a part and parcel of the general body of the property of this state, and was subject to the taxing power thereof, and that the tax was properly assessed thereon.

The judgment of the trial court is affirmed, with costs in favor of respondent.

Sullivan, J., concurs.

An Original Package, as applied to interstate commerce, is a package, bundle or aggregation of goods, put up in whatever form, covering or receptacle for transportation, and as a unit transported from one state to another: *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703; *McGregor v. Cove*, 104 Iowa, 465, 65 Am. St. Rep. 522; *Commonwealth v. Paul*, 170 Pa. 284, 50 Am. St. Rep. 776. The case, box or bale in which separate articles are placed together for transportation constitutes the original package. No single article therein, though separately wrapped, is an original package: *State v. Parsons*, 124 Mo. 436, 46 Am. St. Rep. 457. Small pasteboard boxes, each containing ten cigarettes, separately sealed and stamped with a revenue stamp, shipped loose, unaddressed, but delivered to an express company for transportation, the company's receipt showing the number of packages and the person to whom they are shipped, are not original packages: *Cook v. Marshall County*, 119 Iowa, 384, 104 Am. St. Rep. 283.

PRATT v. NORTHERN PACIFIC EXPRESS COMPANY.

[13 Ida. 373, 90 Pac. 341.]

CARRIERS—Ownership of Property Consigned—Right to Sue. If a shipper delivers his property to a carrier, marked and addressed to another person as consignee, and gives the carrier no other or further notice than that to be presumed and inferred from the act of consignment, the law will presume the contract for transportation to have been made for and on behalf of the consignee, and that he is the owner of the property and entitled to its possession and to sue therefor. (pp. 273, 274.)

CARRIERS—Ownership of Goods Consigned.—If a shipper delivers his property to a carrier without special instructions as to its ownership or its delivery on any condition, the consignee becomes immediately entitled to the possession of the property, and may demand and lawfully receive it forthwith from the carrier, and the latter is justified in delivering it to the consignee at any point on its line of transportation. (p. 274.)

CARRIERS—Express Companies—Ownership of Property Consigned—Right to Sue.—If a consignor intrusts money to an express company with general directions to deliver it to a consignee named, he thereby vests the right to the possession of the money in the consignee, and in the absence of any different or contrary instructions, or any demand for the money, prior to the consignee's demand therefor, the latter is entitled to recover it, upon the failure

and refusal of the express company to deliver the money to him. (p. 275.)

CARRIERS—Ownership of Property Consigned.—If property is received by a carrier on an unconditional and unrestricted consignment, the carrier not only may, but must, treat the consignee as the absolute owner until it receives notice to the contrary. (p. 275.)

J. E. Babb, for the appellant.

I. N. Smith and J. Green, for the respondent.

³⁷⁵ AILSHIE, C. J. This action was prosecuted by the plaintiff against the Northern Pacific Express Company for the recovery of the sum of six hundred and sixty dollars, consigned by one J. W. Pratt from the defendant's office at Culdesac, Idaho, to the plaintiff at Lewiston, Idaho. On the twenty-third day of November, 1904, the consignor, J. W. Pratt, delivered to the defendant's agent at its office in Culdesac a sack or package for shipment containing six hundred and sixty dollars, lawful money of the United States, and prepaid the charges thereon, and the package was addressed and directed to the plaintiff at Lewiston. The defendant's agent issued to the consignor a receipt, the principal part of which is as follows:

“Culdesac, Idaho, November 23, 1904.

“Received of J. W. Pratt 1 sk. said to contain money valued at six hundred and sixty and no-100 dollars, and marked J. M. Pratt, Lewiston, Idaho. Prepaid 50 cents, which we undertake to forward to our agency nearest and most convenient to destination only,” etc.

The express company neglected and refused to deliver this money to the consignee, and after written demand was made upon the agent at Lewiston, and refusal to pay, this action was instituted. It seems from the evidence that the night after the deposit of this money with the express company its ³⁷⁶ office was robbed and this money, together with other property, was taken therefrom. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was overruled. The defendant then answered putting in issue all the material allegations of plaintiff's complaint. After the evidence was all in the defendant moved for a nonsuit on various grounds, the principal of which is that the plaintiff, the consignee, was not the owner of the money consigned, and had no property therein and could not maintain this ac-

tion against the company, and that the only person who had any interest in the property or incurred any risk in the shipment was the consignor, and that he alone could sue. This motion was overruled. The case was submitted to the jury and they returned a verdict in favor of the plaintiff. This appeal is from the judgment and an order denying a motion for a new trial.

The only proposition presented by the appellant on this appeal is that the consignor was the proper party to sue, and that the consignee cannot maintain his action herein. The respondent controverts this proposition, but, in the first place, contends that the defendant waived the point by failure to demur under section 4174, Revised Statutes. He contends that this question should have been raised by demurrer to the complaint on the ground "that the plaintiff has not the legal capacity to sue," and that by failure to do so under section 4178, it is precluded from thereafter urging that objection. We do not think this point is well taken. A demurrer on the grounds of want of legal capacity to sue, it seems to us, must relate to some legal disability on the part of the plaintiff to prosecute and maintain his action. As said by Pomeroy in his *Code Remedies* (fourth edition), page 180, this disability must be "such as infancy, coverture, idiocy and the like, and not the absence of facts sufficient to constitute a cause of action." A plaintiff may have legal capacity to sue and to prosecute his action against the defendant, but if he does not have a cause of action, he certainly cannot recover: *Wetmore v. San Francisco*, 44 Cal. 294; *Robinson v. Peru* 377 Plow & Wheel Co., 1 Okla. 140, 31 Pac. 988; *Krewson v. Purdom*, 13 Or. 563, 11 Pac. 281. The demurrer in this case was properly overruled, for the reason that the complaint stated facts sufficient to constitute a cause of action, irrespective of the question as to whether the ownership of the property sued for was in the consignor or consignee. It is pretty generally agreed among the courts and text-writers that the presumption in the first instance is that the consignee is the owner of the property and entitled to maintain an action either for damages sustained or for loss of the property by the carrier. Justice McClain of the supreme court of Iowa, in his article on Carriers (6 Cyc. 510), says: "The presumption that title to the goods passes to the consignee on delivery to the carrier will sustain an action by the consignee as owner, either in tort or for breach of contract, the contract of ship-

ment being presumed to have been made for his benefit." This, we think, states the generally accepted rule of law governing such cases. It therefore follows that if the plaintiff must fail in his action, he must do so upon the facts disclosed upon the trial rather than upon demurrer to his complaint.

The only evidence produced upon the trial touching the ownership and right of possession in this property is that given by the consignor and consignee, and is as follows: The consignor, J. W. Pratt, testified: "I was sending this money to my brother for payment on some money I owed him." The consignee, the plaintiff in this case, testifies on cross-examination as follows: "Q. Do you know why any money was being sent you at that time by your brother? A. Why it was sent to me? Q. Yes. A. He owed me this money. Q. What money is that? A. The money he was to send me. Q. If I understand you, any money that was being sent, if he sent any, was being sent in payment of an indebtedness he owed you? A. Yes, sir." At the trial plaintiff produced the receipt issued by defendant's agent at Culdesac, proved a demand made on the company for the money after they had been given a reasonable time for the delivery of the same, and produced the consignor as a witness on his behalf. It was also shown that the agent at Culdesac had stated to plaintiff's attorney ³⁷⁸ that the office had been robbed and this money had been stolen; that the agent at Lewiston refused to pay the money, and also stated to plaintiff's attorney that he understood the office at Culdesac had been robbed and this money stolen. Under this state of facts this question arises as to whether the plaintiff can maintain this action or it should have been prosecuted in the name of the shipper. This question seems to have disturbed the judicial mind in England at a very early date, even before transportation by land had become very general. In *Griffith v. Engledew*, 6 Serg. & R. (Pa.) 429, 9 Am. Dec. 444, the supreme court of Pennsylvania divided over the application of this principle of law, and in the majority and dissenting opinions will be found an interesting review of the early English authorities on the subject. The majority of the court held that although the title to the goods remained in the consignor, still the contract was made for the benefit of the consignee, and that he might sue upon it, and that the carrier, having received the goods under agreement to deliver them to the consignee, could not be heard to question the latter's right to maintain an action for their

recovery. In later years the English courts seem to have held that the action can only be maintained by the owner of the goods, property or money intrusted to the carrier. In support of this view, the case of *Coombs v. Bristol etc. Ry. Co.*, 3 Hurl. & N. 510, determined in the court of exchequer in 1858, will be found very interesting and instructive.

In this country the point has been variously determined, though perhaps there is not such a great conflict when the facts of the cases are taken into consideration as would at first appear. Where the consignor has sued, the courts have generally held that he was a proper party and could maintain his action, and where the consignee has sued, they have generally sustained him.

In *Ogden v. Coddington*, 2 E. D. Smith, 317, the court of common pleas of New York, in 1854, said: "I think the plaintiffs are right in saying that a mere consignee cannot maintain an action for the negligence of the carrier, or the breach of the carrier's contract. Such right of action belongs to the ³⁷⁹ owner of the goods. The contract of the carrier, as evidenced by the bill of lading, is made with the shipper. If the shipper is owner, or has a special property in the goods, he may sue thereon. If the consignee is owner, then the shipper is regarded as his agent, and the contract being made for the owner's benefit he may sue thereon, in virtue of his property in the goods and his exclusive beneficial interest in the contract." In 1873 the same question arose in Alabama, in the case of *Southern Express Co. v. Armstead*, 50 Ala. 350, and the court there said: "The consignee of goods has the right to sue for their loss by the carrier, notwithstanding another party may be the owner of them. The obligation is to deliver to him. Generally, the property vests in him by the mere delivery to the carrier. Although the absolute or general owner of personal property may support an action for any injury thereto if he have the right of immediate possession, this does not necessarily divest the right of the consignee to sue, notwithstanding he has never had the actual possession."

The case nearest in point with the one at bar as to the facts involved is that of *Bernstine v. Union Express Co.*, 40 Ohio St. 451, determined by the supreme court of Ohio in 1884. The point there determined is stated in the syllabus as follows: "Where a creditor, living at a distance from his debtor, requests the payment of the debt without giving specific in-

structions as to how the money shall be sent, and the debtor sends it by an express company, and it is lost in transitu, the debtor may maintain an action against the company for its recovery."

In the latest edition of Hutchinson on Carriers, volume 3, section 1713, the author in discussing the subject, "When a Consignee may Sue," says: "And it may be stated as a well-settled rule that if the goods are delivered to the carrier on behalf of the consignee, and at his request or by his direction, either express or implied, and no other fact appears, the legal presumption will be that the property in the goods immediately on such delivery becomes vested in him, and that he is the proper party to bring action against the carrier, either in assumpsit in his own name upon the contract with the consignor as his agent, or in case for the breach of duty on ³⁸⁰ the part of the carrier, or in the name of the agent for his use upon the special contract of affreightment. But, after all, the question whether the property in the goods has passed to the consignee by a delivery to the carrier will depend upon the intention of the transaction, and this may always be shown. And if the consignee, after the goods have been destroyed in transit, purchases them from the owner, it has been held that such consignee may maintain an action in his own name against the carrier for damages. And the fact that the goods were destroyed before the consignee's purchase was held to make no difference."

In 6 Cyclopaedia, page 468, Justice McClain, the author of the text, in considering the question as to whom delivery may be made by the carrier, says: "Where the carrier receives the goods under a contract, either express, or implied from the marks on the goods, to deliver them to a person named, without any reservation of power or disposal by the consignor, then the delivery to such person completes the contract and relieves the carrier from further liability. This rests on the assumption which the carrier is authorized to entertain that the title to the goods passes to the consignee on delivery to the carrier": See, also, 7 Am. & Eng. Ency. of Law, 220; 12 Am. & Eng. Ency. of Law, 558. It will be seen that the authorities quite generally agree that where the shipper delivers his property to the carrier, marked and addressed to another person as consignee, and gives the carrier no other or further notice than that to be presumed and inferred from the act of consignment, the law will presume the contract for

transportation to have been made for and on behalf of the consignee, and that the consignee is the owner of the property and entitled to its possession and to sue therefor. It should also be remembered that where the shipper delivers the property over to the carrier without any special instructions as to its ownership or its delivery on any condition, the consignee becomes immediately entitled to the possession of the property, and may demand and lawfully receive it forthwith from the carrier, and that the carrier will be justified in delivering it to the consignee at any point on its line of transportation: 2 ³⁸¹ Hutchinson on Carriers, sec. 735; Southern Ex. Co. v. Williams, 99 Ga. 482, 27 S. E. 743.

In the case at bar the plaintiff might have lawfully demanded this sack of money from the express agent immediately after its delivery by the consignor, and the express company would have been legally justified in delivering it to the plaintiff then and there or at any point along its line of transportation thereafter; provided, however, that the consignor had not in the meanwhile given different or contrary directions to the express company. In *Bernstine v. Union Express Co.*, 40 Ohio St. 451, the creditors had written their debtor to "send them some money," but did not direct him as to the means he should employ in sending it. The court held that it was the duty of the debtor to pay his creditor in person, and that the money while in the hands of the express company was there at the risk of the debtor, and that the loss primarily fell upon the debtor; that the deposit of the money with the express company did not pay the debt and did not relieve the consignor of his liability to his creditors, and that therefore the debtor was a proper party to sue for its recovery. It should be borne in mind, however, that the Ohio court did not hold that under the facts of that case the creditor could not have maintained an action against the carrier. It is true it did hold that the consignor could maintain the action. Had the debtor made no demand of the carrier and the creditors had sued, we are inclined to the opinion that the court would have sustained them in their action. In the case at bar the consignor was indebted to his brother and was sending him this money in payment thereof. The consignor said this was "the money he [the debtor] was to send me." It is therefore apparent from the evidence that J. W. Pratt was to send six hundred and sixty dollars from Culdesac to J. M. Pratt, the plaintiff, at Lewiston. Now, then, the record

is silent as to the manner of the sending or the means he was to employ in sending that money. If the law presumes in the first instance that the consignee was the owner of this money, and the carrier was authorized and directed to deliver it to the consignee, and this was money it had been agreed between debtor and creditor ³⁸² should be sent to the creditor, then, it seems to us, that the fact of the consignee appearing in an action prosecuted against the express company and producing the company's receipt for the money and the consignor as a witness in his behalf, will justify the further conclusion and presumption that the manner of shipment and means employed were also such as had been agreed upon between them. In other words, with the evidence before us as produced in this case, showing that this property was to be sent by the consignor to the consignee, and that the consignment was general in terms, and such as would lead the carrier to the legal conclusion that both the title and right of possession was thereby vested in the plaintiff, and there being no evidence as to the instructions by the consignee as to the means of transmission of the fund, it appears to us more reasonable to infer that the means employed was as agreed upon or as directed than otherwise. The express company is liable to some person for this money, and it can make no difference to the company whether it pay the consignee or the consignor; the only concern it has is to see that it is protected from payment a second time. This judgment in favor of the plaintiff is clearly a bar to the consignor ever maintaining an action against the company for a recovery on the same contract. When he delivered the property to the express company he directed them to deliver it to the plaintiff. He thereby vested in the plaintiff an immediate right to the possession of the property. He never thereafter changed his directions or instructions to the company, and has never demanded of the company that they surrender the property to him or pay damages for a failure to do so. If after the loss of the property, as in this case, the consignee demands its delivery or the value thereof, and upon failure by the carrier to deliver, commences his action prior to any change of instructions on the part of the consignor or demand by him for the property, the consignor should thereafter be precluded from maintaining an action for its recovery or value. Indeed, where the property is received on an unconditional and unrestricted consignment, the carrier not only may, but must, treat the consignee as the absolute

owner until ³⁸³ he receives notice to the contrary: 1 Hutchinson on Carriers, sec. 177; Sonia Cotton Oil Co. v. Steamer Red River, 106 La. 42, 87 Am. St. Rep. 293, 30 South. 303.

It appears to us that considerable fallacy and illogical reasoning has crept into some of the cases to which our attention has been called, and this seems to be due largely to the fact that in these cases the question has been treated with a view to the relation existing between the shipper and consignee in reference to the ownership and right of possession of the property; rather than considering the true question of the relation the carrier sustains to each of these parties respectively. Any difference or diversity of interest that may arise between the consignor and consignee can in no respect concern the carrier so long as it is protected against responding for the property more than once. The ownership may be general and unqualified, or special and limited; the right of possession may be absolute or contingent; in either instance the interest would be sufficient on which to found an action in the absence of the assertion of a superior right in another. The success of the demand and claim of one apparently entitled to possession as against the carrier will relieve the carrier from further responsibility even to one having a better right. Under our statute (Rev. Stats., sec. 4113; First Nat. Bank of Hailey v. Bews, 3 Idaho, 486, 31 Pac. 816), if there is any question or doubt as to the party to whom the carrier is liable, all necessary parties may be brought in and required to set up their interests, and thereby determine the respective rights and effectually protect the defendant from the possibility of the assertion of any further claim by other parties. So in the case at bar, the express company might have had the consignor brought in as a party to set up any interest or claim he might have. We think the plaintiff has shown sufficient interest in the subject of the action herein to sustain the verdict and judgment in his favor.

No other assignment of error has been argued by appellant, and we take it that there is none that merits consideration. We are not unmindful of the fact that some things we have said herein are in conflict with what is perhaps the ³⁸⁴ weight of authority, but of the substantial justice which our conclusions reach we have no doubt. If our reasoning should appear to any illogical, it is in no worse plight than the reasoning of some of the cases we have examined as the

same presents itself to our minds. The judgment is affirmed, with costs in favor of the respondent.

Sullivan, J., concurs.

The Right as Between the Consignor and Consignee of goods to demand their possession from the carrier, and to sue for their loss during transportation, is discussed in *Capehart v. Furman Farm etc. Co.*, 103 Ala. 671, 49 Am. St. Rep. 60; *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42, 87 Am. St. Rep. 293; *Templeton v. Equitable Mfg. Co.*, 79 Ark. 456, 116 Am. St. Rep. 88; *Missouri Pac. Ry. Co. v. Peru-Van Zandt Imp. Co.*, 73 Kan. 293, 117 Am. St. Rep. 468. If one not the owner of property delivers it to a carrier for shipment, the true owner, who is not a party to the contract of shipment, may, while the property is in the possession of the carrier, demand and reclaim it, and, upon refusal, enforce his demand by suit: *Georgia R. R. Co. v. Haas*, 127 Ga. 187, 119 Am. St. Rep. 227.

MULLEN & CO. v. MOSELEY.

[13 Ida. 457, 90 Pac. 986.]

GAMING—Recovery of Gambling Devices.—An action in replevin or claim and delivery cannot be maintained for the recovery of articles admitted to be devised and constructed solely and exclusively for gambling purposes, and only capable of use in violating the laws of the state. (p. 280.)

GAMING—Recovery of Gambling Devices.—No one can maintain an action for injury to, or for the recovery of, an article used solely for gambling in violation of the penal laws of the state. (p. 281.)

GAMING—Seizure and Destruction of Gambling Devices.—A statute which authorizes the summary seizure and destruction of gambling devices is a legitimate and valid exercise of the police power of the state for the protection of the morals, peace, safety and prosperity of the community. (p. 284.)

CONSTITUTIONAL LAW—Summary Seizure of Gambling Devices.—A statute authorizing a summary seizure and destruction of gambling instrumentalities and devices is valid, and not unconstitutional as depriving the citizen of his property without due process of law. (p. 284.)

GAMING—Gambling Devices—Nuisances.—Instruments and devices by and with which gambling is carried on are nuisances without any express declaration to that effect in a statute prohibiting their use and authorizing their summary seizure and destruction. (p. 285.)

GAMING—Summary Seizure of Gambling Devices.—Gambling implements which are designed to be used in violation of the criminal law may be summarily seized by the police authorities under a statutory power of general police regulation and to prevent crime. (p. 285.)

Hawley, Puckett & Hawley, for the appellants.

C. F. Koelsch and R. P. Quarles, for the respondent.

⁴⁶⁰ AILSHIE, C. J. This action was commenced by the plaintiffs to recover a number of "slot machines" from the defendant, ⁴⁶¹ who was then sheriff of Ada county. The cause was determined in the district court on an agreed statement of facts, and judgment was entered against the plaintiffs and in favor of the defendant for his costs. The plaintiffs have appealed from the judgment. It is stipulated, among other things, as follows:

"That on or about the 23d day of March, 1905, plaintiff was and now is the owner of the following described personal property, to wit:

"Six (6) Mills' slot machines, numbered 8,592, 6,171, 12,232, 8,392, 751 and 661, respectively, one (1) Wattling machine and two Gable slot machines of the value, if of any value at all, of one hundred and twenty-five (\$125.00) dollars.

"That said defendant came into the possession of said property lawfully.

"That before the commencement of this action, to wit, on the 20th day of January, 1906, plaintiff demanded the possession of said property from the defendant, but to deliver the same, or any part thereof, defendant refused and still refuses, and withholds the possession thereof from the plaintiff to his damage, if to his damage at all, in the sum of one (\$1.00) dollar.

"That said property above described are gambling devices, and were devised, and are designed and constructed for the sole and only purpose of playing games of chance for money, and are not adapted to any other use, or for any other purpose; and are devised and adapted solely, entirely and only to the betting of money, at which money is lost or won, and are not capable, susceptible or fitted to be devoted or used in, or for any other purpose or purposes.

"That at the time said machines were originally seized by Constable A. Anderson, and for some days prior thereto, said machines were all being used for the sole purpose of playing games of chance at which money was bet, and won or lost, in Boise, Ada County, Idaho.

"That on the 22d day of October, 1904, information in writing and under oath, was presented to W. C. Dunbar, a ⁴⁶² duly elected, qualified and acting Justice of the Peace in

and for Boise Precinct No. 2, Ada County, Idaho, as such Justice of the Peace, that gambling devices, to wit, the slot machines mentioned and described herein, were within the City of Boise, Ada County, Idaho, and within the jurisdiction of said Justice of the Peace, and were then and there in operation, and used as such gambling devices, and particularly described said machines, and the places where the machines were then situate.

“That thereupon said Dunbar as and acting as such Justice of the Peace, thereafter issued warrants directed to the Sheriff or any Deputy Sheriff or Constable of said county, commanding that the said gambling devices, the said slot machines mentioned and described herein, and other slot machines, be seized and brought before him in his office in Boise, in said county and state, to be dealt with according to law, and thereafter placed the said warrants in the hands of A. Anderson, a duly elected, qualified and acting constable of said precinct, who under and by virtue of said warrants seized said slot machines and brought the same before said justice of the peace to be dealt with as directed by the statutes in such case made and provided.”

It is further stipulated that after the machines were brought before the justice of the peace, and after an inspection thereof by the justice and his ascertainment that they were gambling devices and designed for the purpose of playing games of chance, the justice made his order, commanding and directing that the machines be publicly destroyed; that prior to the destruction thereof an action was commenced in the district court for the recovery of the machines by the Mills Novelty Company against the justice of the peace, W. C. Dunbar, and that it was thereupon stipulated and agreed that during the pendency of the action in claim and delivery, the property should be delivered to and held by the sheriff of the county. The case of the Mills Novelty Company v. Dunbar was heard and determined in the district court, and thereafter upon appeal to the supreme court, 11 Idaho, 671, ⁴⁶³ 83 Pac. 932, and the judgment was in favor of the defendant. Upon the determination of that case this action was commenced by these plaintiffs against the sheriff, claiming the specific articles herein enumerated. The order for the destruction of these machines was had in conformity with and under the provisions of sections 1 and 4 of the act approved February 6, 1899

(Sess. Laws 1899, 389), and known as the anti-gambling law. Those sections are as follows:

“Sec. 1. Every person who deals, plays or carries on, opens or causes to be opened, or who conducts, either as owner, employé or lessee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge-et-noir, rondo, or any game played with cards, dice, or any other device, for money, checks, credit or any other representative of values, is guilty of a misdemeanor and is punishable by fine not less than two hundred dollars or imprisonment in the county jail not less than four months.”

“Sec. 4. Whenever any judge or justice of the peace shall have knowledge or shall receive satisfactory information that there is any gambling table or gambling device, adopted or devised and designed for the purpose of playing any of the games of chance prohibited in section 1 of this Act, within his district or county, it shall be his duty to forthwith issue his warrant, directed to the sheriff or constable, to seize and bring before him such gambling table or other device, and cause the same to be publicly destroyed, by burning or otherwise.”

The appellant attacks section 4 of this act on the ground that it is in violation of section 13, article 1 of the state constitution, which provides, among other things, that “no person shall . . . be deprived of life, liberty or property without due process of law.” Counsel for appellants insist that the summary seizure and destruction of property as provided for in section 4 of the act amounts to depriving him of his property “without due process of law.”

Counsel for respondent urge, in the first place, that since appellants have stipulated and agreed that these “machines are gambling devices, designed and constructed for gambling⁴⁶⁴ purposes and incapable of being used for any other purpose,” they cannot, therefore, maintain their action in claim and delivery for the recovery of the same. In support of this contention on the part of the respondent, he cites *Spaulding v. Preston*, 21 Vt. 10, 50 Am. Dec. 68; *Board of Police Commrs. v. Wagner*, 93 Md. 182, 86 Am. St. Rep. 423, 48 Atl. 455, 52 L. R. A. 775; *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438.

Without reviewing the authorities or going into any extended consideration of the reasons presented in support of the principle they announce, we are content to hold that the

appellants cannot maintain their action in replevin or claim and delivery for the recovery of articles that they admit are devised and constructed solely and exclusively for gambling purposes, and are only capable of use in violating the laws of this state. This court will not countenance an action looking to the recovery of such an article of articles. It is conceded that the only possible value they can have is for use in violating the penal statutes of this state; that in order to be valuable and command any price in the market, it is necessary that they be used in the commission of crime. The courts of this state will not permit any person or number of persons to maintain an action for injury to or recovery of an article of such character. The plaintiffs, under such circumstances, have no standing in court. They have no grievance to present to a court, and they will not be heard to cavil over the right of possession of instruments of crime.

We are content to rest our decision in this case upon the grounds above announced, but since the validity of this provision of the anti-gambling law has been argued in this case and called in question in several other cases in this court, and has never been passed upon, and in view of the further fact that there is apparent laxity in the enforcement of this statute in some parts of the state—possibly growing out of a doubt as to its validity—we are impelled to express the opinion of the court in relation thereto.

The leading and perhaps most numerous cited authority as to the validity of such a law is the case of *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385. This case was decided by the supreme court of New York (119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134), and was taken to the supreme court of the United States on a writ of error. That case involved the validity of an act of the legislature of the state of New York, prohibiting the taking of fish from certain waters within that state, and also authorizing the summary seizure and destruction of any nets or other means or devices for taking and capturing fish in violation of the provisions of the act. The proper officers seized a number of fish nets and summarily destroyed them, and it was contended that this action amounted to taking property without due process of law, and was, in that respect, in violation of the "due process" clause of the constitution of the United States. The validity of the statute was upheld by the supreme court of New York, and the deci-

sion of that court was affirmed by the supreme court of the United States. The opinion of the latter court contains so much that is in point in the case at bar that we shall freely quote therefrom. In considering the power of the legislature to enact such a provision, the court says: "The legislature undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them."

Again, in considering the question of the value of the property thus destroyed, the court says: "But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; destruction of decayed fruit or fish or unwholesome ⁴⁶⁶ meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. . . . It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of cards, chips and dice of a gambling-room."

In answer to the contention that it vested the officers with power to summarily determine, without notice, the character of the article, and whether or not it was such an article as came within the inhibition of the statute, the court said: "Nor is the person whose property is seized under the act in question without his legal remedy. If, in fact, his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or if they have been destroyed, may have his action for their value. In such cases, the burden would be upon the defendant to prove a justification under the statute."

After citing a number of cases in support of its opinion, the court distinguishes the cases of *Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115; *Dunn v. Burleigh*, 62 Me. 24; *King v. Hayes*, 80 Me. 206, 13 Atl. 882; and criticises, as too restrictive and technical, the cases of *Lowry v. Rainwater*, 70 467 Mo. 152, 35 Am. Rep. 420; *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; *Ridgeway v. West*, 60 Ind. 371. *Chauvin v. Valiton*, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194, and *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455, are not in point in the case at bar, owing to the widely different state of facts on which they rest. *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302, involved the seizure and condemnation of vessels unlawfully engaged in taking oysters and disturbing oyster-beds. The right of trial by jury before condemnation was there claimed, and it was also held that the method prescribed by statute did not furnish the owner with a remedy amounting to "due process of law." It should be borne in mind that fishing vessels are not per se unlawful or a nuisance or incapable of a lawful use. On the contrary, they are of considerable value, and are designed and constructed for lawful and legitimate purposes, and their employment for unlawful purposes is the exception rather than the rule. In that case, the court held that the act authorized an unreasonable and unnecessary exercise of the police power of the state; that neither the public morals, safety nor the peace and order of society required such an exercise of the police power.

We are aware that many courts have held legislative acts similar to the one under consideration unconstitutional and void, on the ground that they provide for taking property without due process of law. With the principles of law an-

nounced by those authorities we are in hearty accord, but to a statute like ours, we cannot accord these principles the application given in many of the cases. The uniform holdings of this court have been along the lines of a liberal construction in favor of a due and ample exercise of the police power of the state, looking to the protection of the public morals and the maintenance of peace and quiet as well as the protection of life and property. The determination of the means necessary to attain those ends primarily rest with the legislative department of the state government, and is always subject to the supervision and consideration of the courts established for that purpose.

⁴⁶⁸ In this case the articles or property seized, if they might be called such, are instruments of crime only. The most effectual method of preventing the crime is to destroy the specific instruments designed and kept for its perpetration. This is peculiar to the crime of gambling as to few other crimes. A man might commit murder with an implement of husbandry or the tool of an artisan, but for that reason the legislature would not be justified in directing the summary seizure and destruction of hoes and hammers, but it might with wisdom and propriety authorize the summary destruction of infernal machines. Under the police power of the state, we prohibit the herding of certain livestock within a specified distance of a dwelling-house; we kill diseased animals and quarantine against contagious and infectious diseases; and for the same reasons we destroy the devices and tools of the gambler that the morals of the community may be protected from his contagion and the peace and safety and prosperity thereof may not be invaded. Under the constitution, no man's property may be taken without due process of law, but when he invokes the protection of this constitutional provision, he must show that he is invoking it for the protection of something that is really property and falls within the meaning of that term. He is entitled to his day in court when his property rights are invaded, but this guaranty can scarcely be invoked where he seeks his day in court that he may dispute with the officers of the law the right of possession of instrumentalities, tools and machines contrived and designed as a ready means to be directed against society, and in violation of the laws of the land in the commission of crime. In such case there can be no doubt

of the power of the legislature to authorize a summary seizure and destruction of such instrumentalities and devices.

It is generally difficult to detect and get hold of the players of unlawful and prohibited games on account of their alertness and ready means of locomotion, but the dumb instruments they leave behind for obvious reasons are always ready for business, and the law contemplates disabling them as a most effective way in which to prevent the recurrence of the ⁴⁶⁹ offense. They are a menace to the welfare of the community, and invite breaches of the law. The public authorities are required to destroy them for the same reason that they would destroy dies and plates for counterfeiting or the stills and vats of the moonshiner.

It has been urged by counsel for appellants that in order to authorize the destruction of these machines it was necessary for the legislature to declare them a nuisance. The legislature has in effect done so. It has prohibited their use in any manner or form, and has also directed that when any such instruments are found within this state, they shall be seized and destroyed. Making their use a crime and rendering them incapable of any legitimate use, reduces them to the condition and state of a public nuisance which they clearly are. This amounts as effectually to declaring them a nuisance as if the word "nuisance" itself had been used in the statute.

Gambling itself was a nuisance at common law, and is in no better plight now that it has been specifically designated as a crime by our statute, and it therefore appears that the instruments and devices by and with which it is carried on must themselves be nuisances. The following authorities sustain the validity of similar legislation: Board of Police Commissioners of Baltimore v. Wagner, 93 Md. 182, 86 Am. St. Rep. 423, 48 Atl. 455, 52 L. R. A. 775; Garland Novelty Co. v. State, 71 Ark. 138, 71 S. W. 257; Furth v. State, 72 Ark. 161, 78 S. W. 759; State v. Soucie's Hotel, 95 Me. 518, 50 Atl. 709; Ex parte Keeler, 45 S. C. 537, 55 Am. St. Rep. 785, 23 S. E. 865, 31 L. R. A. 678; Glennon v. Britton, 155 Ill. 232, 40 N. E. 595; Bobel v. People, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322; Deems v. Baltimore, 80 Md. 164, 45 Am. St. Rep. 339, 30 Atl. 648, 26 L. R. A. 541.

In 25 American and English Encyclopedia of Law, second edition, 146, the author of the text says: "Articles which are designed to be used in violation of the criminal law may be

summarily seized by the police authorities under a statutory power to prevent crime; and the seizure of such articles is not taking of property without due process of law within the ⁴⁷⁰ constitutional inhibition. So articles or instruments impressed with the characteristics of adaptation, and intended and used for purposes prohibited by law and contrary to public health, peace, or morals, are subject to summary seizure under statutory or general police regulations."

It has also been urged by counsel for appellants that the act is unconstitutional as being in violation of section 17 of article 1 of the constitution, which reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause, shown by affidavit, particularly describing the place to be searched and the person or thing to be seized."

The question cannot arise in this case, for the reason that it is admitted by the agreed statement that the sheriff came lawfully into the possession of these machines, and there is no contention that any unreasonable search or seizure was made: *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S. W. 257. Section 5 of the act provides that the officer who shall have charge of the execution of any warrant issued under section 4 thereof shall have all powers granted in cases of search-warrants. Appellants contend that under the foregoing provision of the constitution no search-warrant can be issued except upon affidavit of probable cause. That may be true, and if so, the statute would still be read in connection with the constitutional provision, and the "knowledge or satisfactory information" which the justice or judge must possess before issuing his warrant would have to be received in the form of and be conveyed by affidavit. It will be observed that the statute does not, in terms, dispense with the affidavit. It should also be borne in mind that section 8 of the act makes it a misdemeanor for any "county attorney, sheriff, constable or police officer" to refuse or neglect to "inform against persons whom they have reasonable cause to believe offenders against the provisions of this act." It therefore appears that the law makes it the official duty of certain officers to "inform against" offenders. The question would naturally arise as to whether the search of a ⁴⁷¹ gambling-house or seizure of gambling devices would be

“unreasonable” under the provisions of this section of the constitution.

For the reasons herein announced, the judgment of the trial court must be affirmed, and it is so ordered. Costs awarded in favor of the respondent.

Sullivan, J., concurs.

The Constitutionality of Statutes Authorizing the Summary Destruction of gambling devices and apparatus has been recognized in a number of recent decisions: See *Woods v. Cottrell*, 55 W. Va. 476, 104 Am. St. Rep. 1004; *Board of Police Commrs. v. Wagner*, 93 Md. 182, 86 Am. St. Rep. 423; *Frost v. People*, 193 Ill. 635, 86 Am. St. Rep. 352. So has the validity of statutes authorizing the destruction of fishing apparatus used in violation of law: See *State v. French*, 71 Ohio St. 186, 104 Am. St. Rep. 770. Compare, however, *McConnell v. McKillip*, 71 Neb. 712, 115 Am. St. Rep. 614.

McKNIGHT v. GRANT.

[13 Ida. 629, 92 Pac. 689.]

CONSTITUTIONAL LAW—Jurisdiction of Probate Courts.—A statute authorizing a probate court to make an order for the publication of summons upon a showing of certain facts by affidavit is not unconstitutional as authorizing a probate judge to make the order for publication in a case not pending in his court, but in the district court in a case involving a sum or controversy over which the probate court has no jurisdiction. (p. 289.)

CONSTITUTIONAL LAW—Jurisdiction of Probate Courts—Order for Publication of Summons.—Under a constitutional provision that the legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, the legislature has authority to confer upon a probate court the power to make orders for publication of summons in cases pending in other courts. (p. 290.)

CONSTITUTIONAL LAW—Jurisdiction of Courts.—A constitutional provision that the legislature has no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, is intended simply to preserve to the judicial department the right and power to finally determine controversies between parties involving their rights and upon whose claims some decision or judgment must be rendered, or determination made. (p. 290.)

SUMMONS—Immaterial Defect.—If the defendant is neither deceived nor misled by a sentence contained in a summons as to the time within which he must appear and answer, the summons is sufficient, although it is not strictly within the statutory form. (p. 291.)

SUMMONS—Error in Publication.—If the plaintiff's true name appears in the original summons and complaint and also in the copy

thereof mailed to the defendant, but in the summons as published the first two letters of the name "McKnight" are omitted, such mistake is not fatal to the jurisdiction of the court. (p. 292.)

SUMMONS—Error in Publication.—If in a summons as published the word "filed" is omitted from the sentence "You are hereby notified and required to appear in the above-entitled court in the above-entitled cause and answer the complaint of the plaintiff filed herein," this is not a fatal omission or variance if a correct copy of the complaint and summons has been mailed to the defendant. (p. 292.)

SUMMONS—Affidavit for Publication of Diligence.—If a plaintiff in his affidavit for publication of summons shows clearly that the defendant resides out of the state at the time, it is unnecessary for him to show that he has exercised any further diligence in attempting to find the defendant within the state. (p. 293.)

C. H. Lingenfelter and W. H. Smiley, for the appellant.

I. N. Smith, for the respondent.

⁶³⁴ AILSHIE, C. J. This is an appeal from a judgment entered on default, after service by publication. The plaintiff ⁶³⁵ filed his complaint, and caused certain mining property belonging to the defendant to be attached. The summons was returned not served, for the reason that the defendant could not be found. An alias summons was thereafter issued and the plaintiff made and filed an affidavit for publication of summons, and presented the same to the probate judge of Nez Perce county, that being the county in which the action was commenced, praying for an order for publication of summons. The order was duly and regularly made by the probate judge on the same date, directing publication for six weeks, in the "Lewiston Tribune," and the mailing of a true copy of the complaint and summons to the defendant at his place of residence, that being Detroit, Michigan. Affidavits of mailing, and also of the publication, were made and filed, and the defendant thereafter made a special appearance, and moved to quash the summons and service thereof on various and sundry grounds set out in the motion. The motion was overruled, and a bill of exceptions was prepared, settled and filed, and the appeal was taken from the judgment entered on default.

The first question presented by appellant is that section 4145 of the Revised Statutes is unconstitutional and void in so far as it authorizes a probate judge to order publication of a summons in a case that is pending in the district court. It is first claimed that under section 13 of article 5 of the constitution, which provides that "The legislature shall have no

power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government," the legislature has no authority to confer upon a probate judge the power to make orders for publication of summons in any case pending in another court. Appellant also contends that such power and authority must be exercised by the "court" as distinguished from a "judge." And, again, he contends, that under section 21 of article 5 the jurisdiction of probate courts in civil matters is limited to cases wherein the debt or damage claimed does not exceed the sum of five hundred dollars. It is argued that to authorize a probate judge to make an order for the publication ⁶³⁶ of summons in a case pending in the district court, involving real estate, or a large sum of money, far in excess of the probate jurisdiction, is indirectly conferring upon that court a jurisdiction not given it by the constitution. Section 4145 of the Revised Statutes was in force long prior to, and at the time of, the adoption of the constitution, and at that time our probate court was constituted practically the same with very similar jurisdiction as it has been ever since the adoption of the constitution. It was also provided by the constitution (section 2, article 21) that all laws then in force within the territory "not repugnant to this constitution shall remain in full force," etc. Primarily, the matter of the service of process is purely ministerial. It has, however, been held in this state and other states having statutes similar to our sections 4145 and 4146, providing for service by publication, that the making of an order for publication is the exercise of a judicial or quasi-judicial function. In other words, the party seeking to make such a service must make a showing of the probative facts, and the judge to whom this showing is presented must exercise judgment and discretion in determining whether or not such facts bring the plaintiff within the purview of the requirements of section 4145, authorizing the order. It should be borne in mind, however, that the making of such an order is in no manner or respect a determination of the merits of the plaintiff's case, or any part of his case, but is merely a determination that a sufficient showing has been made to justify bringing the defendant into court in response to the plaintiff's alleged cause of action. It is not a determination in advance that a good service is going to be had upon the defendant. It should be further observed that before any

judgment can be entered in the district court in such action, application must be made to the court (Rev. Stats., sec. 4360, subd. 3), and both the power and duty rests with the court in which the case is pending to first determine whether a good and valid service has been made on the defendant, which necessarily involves an examination of all the steps taken in procuring that service. The fact that the order has been made either by the probate or district judge ⁶³⁷ is not conclusive on the court when application is made to him for judgment. We must conclude that although it requires the exercise of a judicial or quasi-judicial function in making the order for publication, nevertheless, it is not the exercise of a function or jurisdiction prohibited by the constitution. Indeed, a careful examination of the constitution at once discloses that it contains no language prohibiting, either directly or indirectly, or by implication, the exercise of such a power and such a function by a probate court or the judge thereof. It confers a grant of certain powers in certain matters. It neither confers in specific terms nor prohibits by implication the exercise of this particular and specific power. Probate judges were exercising this power when the constitution was adopted, and it is fair and reasonable to assume that the framers of the constitution intended that they should continue in the exercise of such power. It is not the exercise of a delegated judicial power for many reasons. First, the power is still exercised by the judicial department of the state government. It is done *ex parte*, and could derive no greater force if done by the court, and requires no determination of any controverted matter or question. On the other hand, section 13 of article 5 of the constitution was never intended to prohibit other departments of the state government than the judicial from exercising some judicial or quasi-judicial functions. We think by this provision it was rather intended to preserve to the judicial department of the state government the right and power to finally determine controversies between parties involving their rights and upon whose claims some decision or judgment must be rendered or determination made: 23 Cyc. 1613-1623, and notes; *In re Saline Co. Subscription*, 45 Mo. 52, 100 Am. Dec. 337; *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1056; *Walker v. Maxwell*, 74 N. Y. Supp. 94, 68 App. Div. 196; *State v. Le Clair*, 86 Me. 522, 30 Atl. 7; *Century Dictionary*, "Judicial Power." It is a matter of common knowl-

edge to every student of the law that in this country, notwithstanding this constitutional provision to be found in all the states, nevertheless, almost every executive, ministerial ⁶³⁸ and administrative officer has, in many instances, to exercise judgment and discretion of a quasi-judicial nature, and yet the citizen or party who may deem himself aggrieved thereby still has his remedy in the courts. No one has claimed, however, that such officers may not exercise those necessary powers in the discharge of their duties. The exercise of such power is in no respect an invasion of the judicial power reserved to the courts by the constitution.

Considerable space is occupied in appellant's brief in arguing that the direction of the summons as to the time in which defendant should answer is not in conformity with the requirements of subdivision 3 of section 4140 of the Revised Statutes. That provision of the statute requires that the summons shall contain "A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within twenty days, if served out of the county, but in the district in which the action is brought, and within forty days if served elsewhere." The summons in that respect required the defendant to appear and answer "within ten days after the service of the summons upon you, if served within this county and state; within twenty days after the service of this summons upon you if served within the above-entitled judicial district outside of this county and state; otherwise within forty days, if served elsewhere; in either case, exclusive of the day of service." Appellant contends that this is a departure from the statutory requirements, and leaves the time for answering in doubt, and uncertainty, and amounts to no requirement for his appearance in case he is served outside the state. It is true that the sentence is somewhat involved, and opens the way for some refinement of argument on account of the repetition of the words "this county and state." It would have undoubtedly been much better to have followed the statutory language, but, on the other hand, we are satisfied that the defendant was neither deceived nor misled by the sentence contained in this summons as to the time within which he should appear and answer. To one who is not naturally looking for defects in the summons, it would convey ⁶³⁹ the same notion as to the time for answering as that conveyed by the statute.

It is next objected that there is a misnomer in the alias summons as published. The plaintiff's name as appears in the complaint and summons is "H. B. McKnight," but in some way, when the summons was published, it was made to appear, "H. B. Knight." The copy of the complaint and summons, as mailed to the defendant by the clerk, appears to have been correct, but the copy as it appeared in the newspaper, left off the first two letters of the name. A mistake like this is not so material, where it occurs in the name of the plaintiff, as it would be if in the name of the defendant. The defendant ordinarily knows whether he has had any business dealings with the plaintiff or not, and whether he is indebted to him or not. If he were sued under a wrong name, he might have some doubt, however, as to whether he was the real person being sued, and in that respect might be misled into a failure to appear at all. We think, under the circumstances of this case, that the mistake was not fatal: *Martin v. Lundstrom*, 73 Minn. 121, 75 N. W. 1038.

In publishing the alias summons, the printers seem to have omitted the word "filed," as it appears in the following sentence of the summons: "You are hereby notified and required to appear in the above-entitled court in the above-entitled cause, to answer the complaint of the plaintiff filed herein." The sentence as published simply required him "to answer the complaint of the plaintiff herein." This was not a fatal omission or variance. A defendant has notice that under the statute of this state a summons cannot be issued until a complaint has been filed. The recital that he is required to appear and answer the complaint herein is in substance as much of a notice that a complaint has been filed as if it said, "answer the complaint filed herein." "The complaint herein" must necessarily be the complaint in the action in which the summons is issued and from which the statements in the summons are gathered as to the nature of the cause of action.

⁶⁴⁰ Appellant also complains of certain defects in the affidavit made by plaintiff's attorney for the order of publication. The particular complaint made by appellant against this affidavit is that it fails to show diligence on the part of the plaintiff in his endeavor to find the defendant. This affidavit is too lengthy to be set out in full in this opinion. It is worthy of note here, however, that the affidavit is unusually full and succinct and comprehensive in its state-

ment of the steps taken and the efforts made to find the defendant. It is stated in the affidavit that the affiant, being in the city of Lewiston, talked over the phone with the defendant, who was then at Spokane, Washington, and that he also talked with Mr. Smiley, the defendant's attorney, and that each of them informed affiant of the place of residence of the defendant, and that the same was at Detroit, Michigan, and that the defendant never had resided in the state of Idaho, did not reside in the state of Idaho at that time, and was not within the county of Nez Perce, or state of Idaho at the time affiant was making the affidavit, and that the defendant was then residing at Detroit, Michigan. Not content with this, the affiant showed that he had caused the summons to be issued, and that it had been returned not served, for the reason that the sheriff could not find the defendant within the state, and that after inquiry he had been unable to find the defendant within the state. There can be but little reason for showing further diligence in finding a defendant, when the plaintiff discovers that he resides in a foreign state. After a plaintiff has once located the defendant, there is not much use in looking for him at any other place at the same time: *Parsons v. Weis*, 144 Cal. 415, 77 Pac. 1007; *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; *Dunlap v. Steele*, 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563, 16 L. R. A. 361.

Numerous other minor questions have been argued by appellant at great length in connection with the different objections we have just considered, but we do not deem it necessary to take them up in further detail. We find no valid reason why the trial court should have quashed the ⁶⁴¹ summons or service thereof, and no reason why the judgment should be reversed. Judgment is affirmed with costs in favor of the respondent.

Sullivan and Stewart, JJ., concur.

The Legislature is not Prohibited from vesting some judicial functions in persons not holding judicial functions. Certain functions of a quasi-judicial character may, by statute, be vested in ministerial officers: People v. Simon, 176 Ill. 175, 68 Am. St. Rep. 175; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571; *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357. As to what constitutes judicial functions, see *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692; *Zanesville v. Zanesville Tel. etc. Co.*, 64 Ohio St. 67, 83 Am. St. Rep. 725; *Seattle etc. R. R. Co. v. Bellingham Bay etc. Co.*, 29 Wash. 491, 92 Am. St. Rep. 907.

EDMINSTON v. SMITH.

[13 Ida. 645, 92 Pac. 842.]

HUSBAND AND WIFE—Liability of Husband for Necessaries Furnished Wife on Her Credit.—Primarily the husband is liable for the necessities of life of his wife, including board and lodging, and the fact that the debt was contracted by her and the credit was extended to her alone does not relieve him of the liability cast upon him by operation of law and independent of the contract of his wife, and any personal liability she may have incurred in order to secure the credit. (p. 296.)

HUSBAND AND WIFE—Special Promise of Wife to Pay for Necessaries.—If necessities are furnished to a wife for her use and benefit, and upon credit extended on the faith of her special promise to pay therefor, and upon her personal responsibility, she is liable for the debt and may be sued as a feme sole. (p. 297.)

E. A. Cox and E. S. Fowler, for the appellants.

J. O. Bender, for the respondent.

648 **AILSHIE, C. J.** This action was commenced in the lower court to recover from the defendants, who are husband and wife, a balance due for board and lodging. It is alleged that the wife, Martha Smith, entered into a contract with the plaintiff, in advance of incurring the indebtedness, whereby she promised and agreed to pay plaintiff the sum of ten dollars per week for board and lodging for herself and husband, or five dollars per week for each. It is further alleged that after the board and room were furnished the defendants in accordance with the contract, the defendant, Martha Smith, made a further specific promise to pay the bill. Under the contract, plaintiff furnished board and lodging to the husband for thirty-three weeks and to the wife for thirty-nine weeks. The credits, amounting to some two hundred and ninety-six dollars and fifty cents, are all set out in the complaint, from which it appears that payments were made by the wife and others by the husband, and still others by them jointly. The plaintiff alleges that she has applied these payments toward the satisfaction of the bill for the husband's board and the balance toward the wife's, leaving a balance of sixty-three dollars and fifty cents due on the wife's board and lodging. Under the allegations of the complaint, the plaintiff had an undoubted right to apply these payments as she did. This action is, therefore, simply an action to col-

lect the bill for the board and lodging of the wife. Whether the wife could have been held for the husband's board and room in accordance with her contract ⁶⁴⁹ is immaterial for the purposes of this case. Even if she promised to pay a debt for which she could not be held, still there is no way to keep her from paying it if she wishes to keep her promise. She has the unlimited and absolute right of disposition of her separate property. When she comes to making payments on the indebtedness, if she fails to direct the application of the payment and indicates no intention of repudiating her contract as to the part on which she cannot be held in an action, the creditor may apply the payment as he chooses.

The defendants demurred to the complaint separately, each on the following grounds: "1. That the complaint does not state facts sufficient to constitute a cause of action; 2. That there is a misjoinder of parties defendant; 3. That there is a misjoinder of causes of action." On the part of the wife, it is contended that the debt was either a debt of the husband or a community debt for which the wife cannot obligate herself. On the part of the husband, it is contended that he is not liable, for the reason that the complaint shows that the credit was extended to the wife on her promise and not upon any implied liability of his. The position taken by the appellants is tersely stated by their counsel in their brief as follows: "Our contention is that the wife cannot legally, in this state, bind herself for the debt sued upon; that she did not bind, or attempt to bind, her husband, and that the credit was not given to him; and that as a result, neither one of them is liable." If this position be correct, it will prove an easy way to settle the board bill and will solve a problem that has long been embarrassing to not a few.

In support of the wife's position, we are cited to the following cases from this court: *Bank of Commerce v. Baldwin*, 12 Idaho, 202, 85 Pac. 497; *Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643; *Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 399; *Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893; *Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188.

Bank of Commerce v. Baldwin, 12 Idaho, 202, 85 Pac. 497, was decided since the passage of the act of March 9, 1903 (Sess. Laws 1903, p. 345), and all the other cases were decided prior to that act. It ⁶⁵⁰ has been uniformly held, however, by this court that the wife is not liable unless "the debt was incurred for the use and benefit of her separate

property, or was contracted by her for her own use and benefit." The court has always recognized the power and authority of the wife to enter into valid and binding contracts "for her own use and benefit," and has, on the other hand, constantly held that she could not bind herself as a surety or for debts not her own except where she incurred such debts by a specific lien upon her separate property. As to what constitutes debts "for her own use and benefit," is quite another question. The courts have decided more frequently what are not than what are such debts. Primarily, the husband is liable for the board and lodging of his wife (21 Cyc. 1151, 1152, and note; *Emmett v. Morton*, 8 Car. & P. 506), and the fact that the debt was contracted by her and the credit was extended to her does not relieve him of the liability cast upon him by operation of law and independent of the contract of the wife and any personal liability she may have incurred in order to secure the credit.

The liability of the wife, if any, rests on her contract and promise to pay, while the husband's liability for a necessary, such as board and room, grows out of, and is incident to, his marital duties, and arises therefrom by operation of law. The wife is entitled to these necessities at the husband's expense, but if he neglects to furnish them and she cannot secure them on his credit, and can do so on the faith of her own promise to pay the bill, she is certainly entitled to procure them in that manner. If the creditor parts with his goods on the faith of the wife's promise to pay, he is entitled to recover against her if the debt is not paid. The fact that she is obliged to obligate herself can in no way relieve the husband of his duty and responsibility in the matter. The wife has a right, on the other hand, to have the husband holden for the debt so that if it can be collected from him, she may be relieved of that obligation. The creditor is entitled to hold the husband, although he is not willing to part⁶⁵¹ with his goods without the additional assurance of the wife's personal obligation to pay the debt.

A different view was expressed in *Maxon v. Scott*, 55 N. Y. 247, where the controversy arose over the liability of the wife only for board furnished herself and husband on her contract. In course of the opinion, the court said: "Laying for the present the coverture of Mrs. Bemis out of view, this was clearly a contract by her as principal and not as surety for her husband. If he boarded with the defendant with

her, under this contract, the credit was given to her and to her separate estate, and not at all to him, and he would not become debtor to the defendant therefor. The law would not imply a promise by him to pay for the board when it was shown that it was furnished at the request of and upon the credit of his wife, and of her separate estate." The trouble with this statement by the New York court lies in the assumption on which it is founded. "Laying the coverture of the wife out of view," changes the whole proposition. As between strangers, there can be no question about the correctness of the statement that the credit having been extended to the one, the charge could not become the debt of the other; but a legal relation existing between the husband and wife, which made the husband originally and independent of contract liable for the debt, the promise of the wife to pay could in no respect relieve the original and primary debtor or place him in any worse position than he would have been in had she secured the credit on the faith of his responsibility without any promise on her part.

We conclude that the husband is unquestionably liable for the debt, and that a good cause of action is stated against him. As for the liability of the wife, it is equally clear to us that she is bound by her contract. The provisions and accommodations were furnished for her use and benefit, and the credit was extended on the faith of her promise and responsibility: Long on Domestic Relations, sec. 64; Priest v. Cone, 51 Vt. 495, 31 Am. Rep. 695; 25 Am. & Eng. Ency. of Law, 405. If she cannot be held for a debt of this kind, a woman who has an improvident, impecunious and worthless ⁶⁵² husband might be compelled frequently to live on the charity of neighbors for want of credit at the markets and provision stores. The law fully authorizes and the interest of the wife equally demands that she bind herself personally for such necessities when she finds that she must do so in order to obtain them. Section 3 of the act of March 9, 1903 (Sess. Laws 1903, 346), permits the wife to sue and to be sued the same as a feme sole. This, of course, grants the same right to sue and be sued in an action at law as in a suit in equity, and carries with it all the rights of process to collect and enforce judgments and decrees entered therein. Under our constitution and statutes the wife is a distinct person and independent legal entity from her husband.

The objection that there was a misjoinder of parties defendant is not well taken. The defendants are each liable for the same debt—the same relief is sought against each.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, J., concurs.

The Liability of a Husband for Necessaries sold to his wife rests upon the assumption that credit is given to him, and that the purchase is made with his implied consent. If credit is given and the goods charged to her, and not to him, he ordinarily is not liable: See the note to *Wanamaker v. Weaver*, 98 Am. St. Rep. 646.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PATTERSON v. NORTHERN TRUST COMPANY.

[231 Ill. 22, 82 N. E. 240.]

PLEADING.—A Cross-bill must be Confined to the subject matter of the original bill, and cannot introduce new and distinct matters not embraced in the original bill. (p. 300.)

PLEADING.—Matters in Cross-bills must be Germane to the matter involved in the original bill, and the new facts which it is proper for the defendant to introduce thereby are such only as are necessary for the court to have before it in deciding the questions raised in the original bill to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which the complainant rests his right to aid or relief. (p. 300.)

PLEADING—Cross-bills.—If an original bill is filed by a trustee solely for the purpose of obtaining an instruction of the court as to his power and duty, as trustee, in bidding at a sale that may be made under a decree of foreclosure theretofore entered, a cross-bill filed for the purpose of vacating the decree of foreclosure upon the ground of fraud is not germane to the original bill, and therefore is subject to demurrer. (p. 300.)

PLEADING—Cross-bills—Want of Equity.—A demurrer to a cross-bill is properly sustained when it shows no equity on its face. (p. 300.)

FRAUD.—Jurisdiction of a court of equity to set aside a decree in foreclosure upon the ground of fraud and collusion can only be invoked when it is made to appear that the complainant has been injured thereby. (p. 301.)

FORFEITURE—Laches—Estoppel.—One who signs an agreement waiving a forfeiture of a leasehold interest in property and authorizes the institution of a suit to foreclose the landlord's lien which terminates in a decree of foreclosure, cannot, after the lapse of many years, by cross-bill raise the question that the trustee of the estate should have insisted upon a strict foreclosure of the lease. (pp. 301, 302.)

J. C. Patterson, pro se.

Judah, Willard, Wolf & Reichmann, Oliver & Mecartney,
and Herrick, Allen, Boyesen & Martin, for the appellees.

²⁶ Per CURLAM. The main contention of appellant is, that the court erred in sustaining the demurrers to the cross-bill and dismissing it for want of equity. The original bill in this proceeding was filed by the Northern Trust Company solely for the purpose of obtaining an instruction of the court as to its power and duty, as trustee, in bidding at a sale that might be made under a decree of foreclosure theretofore entered, and had no bearing upon the merits of the original decree of foreclosure. The relief sought by the answer of appellant and by his cross-bill was to vacate and set aside this decree of foreclosure. The cross-bill was therefore in the nature of a bill of review, and the sole ground urged to sustain it is fraud. A cross-bill must be confined to the subject matter of the original bill, and cannot introduce new and distinct matters not embraced in the original bill: 3 Daniell's Chancery Pleading and Practice, Perkins' ed., p. 1743. Matters in the cross-bill must be germane to the matter involved in the original bill. The new facts which it is proper for the defendant to introduce thereby are such, and such only, as are necessary for the court to have before it in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which the complainant rests his right to aid or relief: 5 Ency. of Pl. & Pr. 640. We are inclined to the opinion that on the facts presented in this record the cross-bill of appellant was not germane, and that on this ground the demurrer was properly sustained (*Ballance v. Underhill*, 3 Scam. 453; *Pestel v. Primm*, 109 Ill. 353; *Gage v. Mayer*, 117 Ill. 632, 7 N. E. 97); but without giving our reasons at length as to that ground for dismissal, we are ²⁷ convinced that the demurrer to the cross-bill was properly sustained on the other ground stated in the chancellor's order—that it showed no equity on its face. "A demurrer in chancery is always to the merits and in bar of the relief sought, and proceeds upon the ground that, admitting the facts to be true as stated in the bill, still the complainant is not entitled to the relief he seeks": *Harris v. Cornell*, 80 Ill. 54. It appears that appellant is an attorney in actual practice, and while he insists that he was not properly advised as to his rights in the matter when he signed said agreement on March 15, 1898, or joined as complainant in the foreclosure proceedings of August 11, 1900, still the cross-bill does not allege that his joinder as plaintiff was

unauthorized, but, on the contrary, states that he gave his consent, and it nowhere appears from this record that such consent was ever afterward withdrawn or attempted to be withdrawn.

It is apparent from the facts presented on the two records that the decision in *Patterson v. Northern Trust Co.*, 230 Ill. 334, 82 N. E. 837, heretofore referred to, is conclusive as to the merits of the cross-bill in this case. In that case it is shown that appellant had been paid in full all that he is entitled to under said deed of trust, and he did not claim in that case, and has not alleged or claimed in this case, that he is in any way injured by the ruling of the court in the original proceedings. It is true that in this case, as in the other, he charges, in his brief, secret agreements between the Northern Trust Company and the Merrimac Building Company, and claims that the original bill to foreclose was brought solely for the benefit of said trust company and its attorneys, but he has not shown in that proceeding, or in this, how he has been injured thereby. The jurisdiction of a court of equity to give the relief asked for in the original proceedings in the other case or on this cross-bill even if it appeared (which it does not) that there had been collusion between the parties, as alleged—could only be invoked by appellant²⁸ if it was shown "that the collusive acts have done an injury" to him: *First Baptist Church v. Syms*, 51 N. J. Eq. 363, 28 Atl. 461; *Central Trust Co. v. Peoria etc. Ry. Co.*, 104 Fed. 420, 43 C. C. A. 613.

As we understand this record, appellant's only basis of claim for injury by the issuing of said order of June 25, 1902, is, that the Northern Trust Company should have insisted on strict forfeiture of the lease. Appellant does not deny that he signed an agreement waiving this forfeiture, and that he authorized the bill of foreclosure in the original proceedings, which amounted to a waiver of notice to forfeit: *Wood on Landlord and Tenant*, sec. 46; 18 Am. & Eng. Ency. of Law, 2d ed., 382-384, and cases there cited. He complains that certain agreements of his attorneys in filing the bill for foreclosure in the original proceedings and in entering the decree therein were not authorized by him. He does not deny that they were authorized to act as his attorneys, and he does not here or in the original proceedings show wherein they misled him or in any way acted without authority. He signed the agreement of March 15, 1898, sub-

stantially waiving any right which he may have had to a strict forfeiture, and never raised any question in this regard until he filed, years after, his answer and cross-bill herein. To insist upon a strict forfeiture of this lease under these circumstances would be most harsh and unjust. On the facts presented by this record we think this delay amounts to such laches as to preclude him from now raising this question.

The appellant is barred by his own acts from raising the question as to the right of the Merrimac Building Company to take an assignee under said lease (*Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563), as he is also barred from questioning the authority of the Northern Trust Company to act as trustee under said deed of trust.

The judgment of the appellate court will be affirmed.

The Nature and Objects of Cross-bills are discussed in the note to *Hurd v. Case*, 83 Am. Dec. 251. Cross-bills ordinarily grow out of matters alleged in an original bill or complaint, and are used to bring the whole dispute before the court, usually raising new issues which may present matters arising between codefendants, but which are not shown by the original bill or complaint: *Jewett v. Iowa Land Co.*, 64 Minn. 531, 58 Am. St. Rep. 555. A cross-bill depends on the original suit, and can be sustained only on matters growing out of and germane to it: *Griffin v. Fries*, 23 Fla. 173, 11 Am. St. Rep. 351.

CULVER v. OSBORNE.

[231 Ill. 104, 83 N. E. 110.]

USURY—Recovery of Usurious Interest Paid.—If a note containing usury has been assigned before maturity, to an innocent purchaser, and the defense of usury thereby cut off, and compelling the maker to pay the note to the assignee, the usurious interest paid may be recovered of the assignor. (p. 303.)

USURY—Recovery of Usurious Interest.—If a note is given upon usurious interest and passes into the hands of a bona fide purchaser before maturity without notice of the usury, and is by him collected, the payment by the maker to the assignee is regarded as compulsory and not voluntary, and equity will require the original payee to pay to the maker the usurious interest included in the note. (pp. 303, 304.)

Dickinson & Lee and Redmon & Hogan, for the plaintiff in error.

C. E. Schroll, for the defendant in error.

¹⁰⁷ SCOTT, J. The master found that there was usury in the contract, and that the principal of the promissory note, assigned by plaintiff in error to his brother, was not greater than the usurious accumulations of the interest with which defendant in error had been charged up to the time that note was given. It is here insisted that this finding is clearly against the evidence. We have examined the proof taken as the same is set out in the abstract, and are entirely satisfied with the finding of the master upon this question.

It is next contended that where usurious interest has been paid it cannot be recovered. This is not the rule where, as in this case, the promissory note containing the usury has been assigned, before maturity, to an innocent purchaser and the defense of usury thereby cut off, and where the maker has been compelled to pay the note to the assignee.

In *Woodworth v. Huntoon*, 40 Ill. 131, 89 Am. Dec. 340, it was held that where a promissory note is given upon usurious consideration and passes into the hands of a bona fide purchaser without notice of the defense and is by him collected, the payment by the maker to the assignee will be regarded as compulsory and not voluntary, and equity will require the ¹⁰⁸ original payee to pay to the maker the usurious interest included in the note,

In the case of *House v. Davis*, 60 Ill. 367, promissory notes containing usury had been assigned before maturity and by the assignee reduced to judgment against the maker, who then filed a bill against the original payee and the assignee, charging that the assignee had notice of the usury at the time the notes were transferred to him, and seeking an injunction to prevent the collection of the usury. In the circuit court it was held that the proof did not sustain the charge that the assignee had notice of the usury when he acquired the notes, and for that reason the bill was dismissed as to him, and thereafter that court rendered a decree requiring that the original payee of the notes bring into court the amount of the usury, and that the maker of the notes bring into court the balance of the judgment, by a day named, for the purpose of satisfying the debt to the assignee. The original payee appealed to this court, where the decree of the lower court was reversed, for the reason that the case made by the evidence was not that stated by the bill, and for the further reason that the court required the payment of money for the satisfaction of the judgment

of the assignee after the latter had been dismissed and when no control could be exercised over him by the court. It was said, however, that the bill should be amended to correspond with the facts, when the maker of the notes should be permitted to bring the amount of the judgment, and interest thereon, into court for the benefit of the assignee, and then he (the maker) would be entitled to recover the usury from the payee.

It follows that the judgment of the appellate court is correct, and it will accordingly be affirmed.

The Defense of Usury cannot, according to some decisions, be asserted against a bona fide holder of a negotiable instrument: *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 50 Am. St. Rep. 860, but see the cases cited in the cross-reference note thereto.

BENES v. SUPREME LODGE KNIGHTS AND LADIES OF HONOR.

[231 Ill. 134, 83 N. E. 127.]

BENEFIT SOCIETIES—Estoppel to Plead Suicide By-law.—If a by-law of a benefit society preventing the recovery of the benefit of a member who commits suicide is in force at the time that a person becomes a member of such society, the fact that it was not contained in a printed copy of the constitution and by-laws of the society furnished such person before he joined the society, and that the other members of his lodge did not know of the existence of such by-law, does not estop the society from pleading it in defense to a suit to recover the benefit of the member who committed suicide. (p. 305.)

BENEFIT SOCIETIES—Presumption as to Member's Knowledge of By-laws.—Persons belonging to a mutual benefit association are conclusively presumed to know what the provisions of the laws adopted by the association are, where such laws are a part of the contract of insurance. (pp. 305, 306.)

Action to recover the amount of a benefit certificate issued by the Supreme Lodge, Knights and Ladies of Honor, to one John Benes, who, while a member of such organization, died by committing suicide. Among the by-laws of such organization was one providing that, "If any member of the order whose relief fund certificate bears date after this section goes into effect, shall, within five years after becoming a member, die by his or her own hand, whether at the time of the act sane or insane, the relief fund certificate of such member shall

become null and void and the payment of no part of the sum named therein shall be made."

Such by-law was in full force and effect at the time that Benes became a member of such organization and received his benefit certificate, and it continued to remain in full force and effect up to and including the time that he committed suicide. Judgment for the defendant organization and the plaintiff appealed by writ of error.

C. D. Lusk and D. C. Jones, for the plaintiff in error.

Ashcraft & Ashcraft and E. M. Ashcraft, for the defendant in error.

¹²⁸ SCOTT, J. The laws adopted by defendant in error fixing the rights and obligations of its members were a part of the contract made with John Benes. Under those laws there could be no recovery in this case, for the reason that the insured took his own life. Plaintiff in error contends that the association is estopped to interpose this provision of its laws as a defense by reason of facts averred by her replication, to the effect that prior to the time when Benes made application for membership in the order he applied to the officers of the subordinate lodge of which he afterward became a member for a copy of the constitution and by-laws of defendant in error, and that these officers gave to him a document which purported to be, and which they represented to be, a printed copy of the constitution and by-laws of defendant in error; that the defendant in error had caused the pamphlet to be printed and issued to subordinate lodges and distributed among the members thereof for the purpose of acquainting them with the constitution and by-laws and with all the laws, rules and regulations of the order; that, relying upon the printed copy so furnished him as containing all the laws of the order, Benes made application and became a member of the subordinate lodge, and neither he nor any other member of the lodge which he joined knew of the existence of any law of the order other than such as were contained in the said printed copy, and that there was ¹²⁹ therein no law, rule or regulation from which it appeared that suicide by a member would under any circumstance bar a recovery upon his benefit certificate.

Persons belonging to a mutual benefit association, or a fraternal beneficiary society, as it is denominated by our

statute, are conclusively presumed to know what the provisions of the laws adopted by the association are, where such laws are a part of the contract of insurance. Such an association is founded upon the mutual rights and obligations of all its members, and if a beneficiary could be permitted to recover in a manner other than according to the written terms of the contract which those insured enter into, mutuality among the members would soon cease. At section 941 of Thompson on Corporations, it is said: "All the members of the corporation or society are presumed, in law, to have notice of its by-laws. This is a legal presumption, conclusive in its nature, and, accordingly, direct proof of such notice is not required. A better statement of this rule is, that when a person becomes a member of a corporation or society he assumes the duty of knowing the internal laws of that society, and agrees to be governed by those laws, whether he knows them or not. If, therefore, an obligation arises against him under those laws, he can no more escape that obligation on the plea of ignorance than he can be heard to plead ignorance of the law of the land in order to escape a civil or criminal liability." In Bacon on Benefit Societies (third edition, section 81) the following language is used: "The by-laws of a society are binding upon all the members and all are conclusively presumed to know them." In May on Insurance (volume 2, section 552) the law is stated as follows: "When a party takes out a policy and the contract is complete, he becomes a member and is bound by its rules and the provisions of the charter, which he is presumed to know. The records of the company are then his records, as evidence for or against him, and the doings of the officers within the scope of their authority are binding upon him." To ¹⁴⁰ the same effect are the following authorities: Niblack on Benefit Societies, sec. 18; Bliss on Life Insurance, 2d ed., p. 766; Pfister v. Gerwig, 122 Ind. 567, 23 N. E. 1041; Simeral v. Dubuque Mutual Fire Ins. Co., 18 Iowa, 319; Coles v. Iowa State Mutual Ins. Co., 18 Iowa, 425; Treadway v. Hamilton Mutual Ins. Co., 29 Conn. 68; Loyd v. Modern Woodmen, 113 Mo. App. 19, 87 S. W. 530.

It follows that the judgment of the appellate court is correct, and, accordingly, it will be affirmed.

The Charter, Constitution and By-laws of a Mutual Benefit Society form part of the contract with its members: Union Fraternal League v. Walton, 109 Ga. 1, 77 Am. St. Rep. 350; Supreme Lodge v. Stein,

75 Miss. 107, 65 Am. St. Rep. 589; Sourwine v. Supreme Lodge, 12 Ind. App. 447, 54 Am. St. Rep. 352; Condon v. Mutual Reserve Assn., 89 Md. 99, 73 Am. St. Rep. 169. And persons entering such a society are presumed to know the terms of the charter and by-laws under which it is organized: Kocher v. Supreme Council C. B. L., 65 N. J. L. 649, 86 Am. St. Rep. 687; In re Assignment Mut. Guaranty Fire Ins. Co., 107 Iowa, 143, 70 Am. St. Rep. 149; note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 555.

REICHERT v. MISSOURI AND ILLINOIS COAL CO.

[231 Ill. 238, 83 N. E. 166.]

TRUST DEEDS—Right of Trustees to Recover Rent.—If a trust deed is made subject to a lease without any reservation of rent, but with an express provision that the trustees shall collect the rent and apply it to the trusts therein declared, they are entitled to recover the rent. (p. 310.)

TRUST DEEDS—Trustees as Joint Tenants.—Trustees are excepted from the provision of the statute requiring a declaration in a conveyance that the estate is held in joint tenancy, and unless there is a provision to the contrary in a trust deed, they hold as joint tenants, and, upon the death of one, the administration of the trust devolves upon the survivor, and nothing passes to the heir or personal representative of the deceased trustee. (p. 310.)

TRUSTS—Legal Estate Taken by Trustee.—A trustee takes precisely that quantum of the legal estate which is necessary to the discharge of his declared powers and duties, regardless of technical terms ordinarily required for the conveyance, and such estate will inure to the trust until the active trusts are accomplished, when the statute of uses will execute the use, and the entire title, both legal and equitable, will be in the one beneficially interested. (p. 310.)

TRUSTS AND TRUSTEES—Filling Vacancies.—One who creates a trust has a right to provide a method for filling vacancies and for the appointment of successors in trust. (p. 311.)

TRUSTS AND TRUSTEES—Filling Vacancies—Construction of Trust Deed.—If a trust deed conveys an estate to trustees, "their successors and assigns," and provides for the appointment of successors in trust to whom the estate shall go, and that upon the appointment of a new trustee, the real estate shall "thereupon be conveyed, assigned and transferred in such manner as to legally and effectually vest the same in the acting trustee," such provision simply means that upon the appointment of a new trustee the estate shall thereupon be deemed to be conveyed and transferred to him, without a conveyance being executed by anyone. (p. 311.)

TRUSTS—Bond for Beneficiaries—Collateral Inquiry.—In a suit by trustees to recover rent from lessees of the trust estate, the question whether the trustees have given the required bond to the beneficiaries does not concern such lessees, and cannot be collaterally inquired into. (p. 311.)

TRUSTS—Parties—Death of Beneficiary.—In an action by trustees to recover rent from lessees of the trust estate, the death of a beneficiary, who is not a party to the suit, does not affect the right to prosecute the suit. (p. 312.)

L. P. Crigler and Schaefer, Farmer & Kruger, for the appellant.

L. D. Turner and Dill & Pfingsten, for the appellees.

241 **CARTWRIGHT, J.** The appellate court for the fourth district affirmed the judgment for fifteen hundred dollars and costs recovered by appellees, against appellant, in the circuit court of St. Clair county, in a suit brought under a mining lease or contract. From the judgment of the appellate court the case is brought to this court by appeal.

It is first contended on behalf of appellant that the suit was not brought in the names of the parties in whom the legal interest in the contract was vested. The facts, so far as they relate to that question, are as follows: On May 7, 1891, Joseph Reichert and Maria Reichert, his wife, executed a lease of certain lands in St. Clair county to Crittenden McKinley and William S. Scott, giving to them the right to take coal from under said lands. The lease was for a term of fifty years from its date, unless the coal should be sooner exhausted, and the lessees agreed to pay one-eighth of one cent for every bushel of coal mined and taken out which would pass over a screen with spaces measuring one and one-half inches between the bars, the amount to be determined by the railroad freight bills or weighmaster's certificates or tickets, or upon any other good and sufficient evidence that would satisfy the lessors. The lessees also agreed to mine the coal and do the work in a proper, workmanlike and skillful manner, regularly, properly and effectually, without waste or destruction to the coal. The lease was assigned by the lessees to the appellant, a corporation of the state of Missouri, and it entered into possession under the lease and began mining the coal. On August 22, 1893, Joseph Reichert died, leaving said Maria Reichert, his widow, and eight children, his only heirs at law. **242** On September 25, 1893, the widow and heirs, together with the wives and husbands of the said heirs, respectively, executed a trust deed to said Maria Reichert and August Barthel, conveying said lands, subject to the lease, to said trustees, "their successors and assigns." The trust deed provided that the

trustees and their successors in trust should have a right to enter into and upon the premises and receive all rents and royalties, issues and profits thereof. The trust deed further provided that if the trustees, or either of them, should die or go abroad to reside, desire to be discharged from, renounce, decline or become incapable or unfit to act in the trusts, then, in every and any such case, it should be lawful for a majority of the heirs mentioned in the trust deed, or a majority of the survivors thereof, by any writing or writings under their hands, attested by two or more witnesses, to nominate and substitute any person or persons to be trustee or trustees in place of the trustee or trustees so dying, going to reside abroad, desiring to be discharged, renouncing, declining or becoming incapable or unfit to act as trustee. The next provision was, that so often as any new trustee or trustees should be appointed, all the real estate which should then be holden upon the trusts should thereupon be conveyed, assigned and transferred, respectively, in such manner that the same might become legally and effectually vested in the acting trustees for the time being, to and for the same uses and upon the same trusts and with and subject to the same powers and provisions as were therein declared and contained of and concerning the real estate. It also provided that every new trustee so appointed should, from the time of filing his bond, be competent, in all things, to act in the execution of the trusts as fully and effectually and with all the same powers and authorities, to all purposes whatsoever, as if he had been thereby originally appointed the trustee in the place of the trustee whom he should, whether immediately or otherwise, succeed. Maria Reichert ²⁴³ died, and on May 18, 1896, August Barthel resigned as trustee. The remaining heirs appointed William J. Reichert and Charles Becker, the appellees, successors in trust to Maria Reichert and August Barthel, in the manner specified in the trust deed, and the trustees so appointed accepted the trust and proceeded to act. The appellant rendered accounts and statements to William J. Reichert and sent checks to him at different times. This suit was brought to the September term, 1903, of the court by the appellees, the new trustees, and the original declaration declared for the rent stipulated in the lease. An additional count charged the appellant with failing to properly work and mine the coal in accordance with its agreement and with wasting and

destroying coal, whereby appellees were deprived of a large amount of rents which they otherwise would and ought to have received.

The argument that appellees could not maintain the suit is based on the proposition that they did not have the legal title to the reversion, and in support of that claim counsel present two propositions: First, that upon the death of Maria Reichert the legal title which she held descended to her heirs at law; and second, that upon the resignation of August Barthel the legal title conveyed to him remained in him, and it would be necessary for him to execute a deed and convey whatever title was vested in him to the newly appointed trustees before they would be authorized to execute the trust.

The grantee of a reversion may or may not be entitled to the rent reserved in a lease. In this case the conveyance is subject to the lease and there is no reservation of rent, but the trust deed expressly provides that the trustees shall collect the rent and apply it to the trusts therein declared. If the appellees were lawfully appointed trustees and vested with the care, control and management of the trust estate they were entitled to maintain the suit. The first proposition above stated is not the law. Trustees are ²⁴⁴ excepted from the provision of the statute requiring a declaration in a conveyance that the estate is in joint tenancy, and unless there is a provision to the contrary they hold as joint tenants. Upon the death of one the administration of the trust devolves upon the survivor, and nothing passes to the heir or personal representative of the deceased trustee: *Golder v. Bressler*, 105 Ill. 419.

Whether the second proposition is correct depends upon a consideration of the law and the provisions of the trust deed. A trustee takes precisely that quantum of legal estate which is necessary to the discharge of the declared powers and duties of such trustee, regardless of technical terms ordinarily required for a conveyance: *Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332; *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918. The estate will inure to the trustee until the active trusts are accomplished, when the statute of uses will execute the use, and the entire title, both legal and equitable, will be in the one beneficially interested. The decision in *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360, relied upon by counsel for appellant, clearly

recognized that doctrine, but held that a conveyance or transfer of personal property was necessary because personal property is not within the statute of uses. Barthel had such an estate as would continue until the active trusts were executed and he resigned before that time was reached, when successors in trust to him and Maria Reichert were appointed, as the trust deed provided. One who creates a trust has a right to provide a method for filling vacancies and for the appointment of successors in trust. The trust deed in this case conveyed the estate to the trustees therein named, "their successors and assigns," and it provided for the appointment of successors in trust to whom the estate should go.

Much stress is laid in argument upon the provision of the trust deed that upon the appointment of a new trustee the real estate should thereupon be conveyed, assigned and transferred in such manner as to legally and effectually vest ²⁴⁵ the same in the acting trustee, but we do not interpret that provision as meaning that a conveyance shall be executed by anyone. The heirs at law of the deceased trustee might be incapable of making a deed, or the beneficiary would have no method of compelling a conveyance except at the end of legal proceedings. The trust deed provides that the trustees and their successors in trust shall have a right to enter upon the premises and collect the rents and royalties, and that every new trustee, from the time of filing his bond, shall be competent, in all things, to act in the execution of the trusts, and we regard the provision in question as meaning that upon the appointment of a new trustee the estate shall thereupon be deemed to be conveyed and transferred to him. That is the only interpretation which is consistent with the conveyance to the trustees and their successors and with the other provisions of the trust deed. The appellees were the proper parties to maintain the suit.

The next point made is that the trustees were required to execute a bond before acting. But it was not necessary to prove that fact in this case. The trustees were appointed and acting as such, and the question whether they had given a bond for the protection of a beneficiary did not concern appellant and could not be inquired into collaterally in this suit.

It is next insisted that the evidence does not support either count of the declaration. It is conceded that we have no authority to examine the testimony for the purpose of determining its weight, which has been settled by the judgment of the appellate court, but the lengthy argument of counsel is based on all the testimony in the case and a comparison and weighing of the same. We will not recite the evidence at length, but the testimony for the appellees, considered by itself, fairly tended to prove the cause of action and was sufficient to sustain the judgment. It tended to prove both that appellant had not paid the stipulated ²⁴⁶ amount for the coal mined, and also that it did not properly mine the coal.

On January 31, 1904, during the pendency of this suit, George Reichert, one of the beneficiaries, died, and if we understand counsel for appellant, they insist that appellees had no right to further prosecute the suit without suggesting his death and making his personal representative a party. He was not a party to the suit and his death did not affect it in any way. Appellees did not bring the suit as agents for him or anyone else, but as trustees having the legal right themselves under the contract.

The judgment of the appellate court is affirmed.

Trustees Take Exactly that Quantity of Interest which the purposes of the trust require: *Temple v. Ferguson*, 110 Tenn. 84, 100 Am. St. Rep. 791; *Coulter v. Robinson*, 24 Miss. 278, 57 Am. Dec. 168.

Grants to Two or More Persons as Trustees are usually held not within the operation of statutes abolishing or discouraging joint tenancy or depriving it of its incident of survivorship: See the note to *Sanders v. Morrison*, 18 Am. Dec. 163.

JONES v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

[231 Ill. 302, 83 N. E. 215.]

CONSTITUTIONAL LAW—Equal Protection of Laws.—A constitutional provision that the legislature shall pass no local or special law granting to any corporation, association or individual, any special or exclusive immunity or privilege, is a guaranty that all valid enactments of the legislature shall be uniform in their operation upon persons and property, and by it all citizens are assured the equal protection of the laws. (p. 315.)

CONSTITUTIONAL LAW—Equal Protection of Laws.—Every citizen has an equal right with every other to resort to the courts of justice for the settlement and enforcement of his rights, and a statute that makes a discrimination between different classes of litigants which is merely arbitrary in its nature is a denial of that right and of the equal protection of the law. (p. 317.)

CONSTITUTIONAL LAW—Equal Protection of Law—Rights on Appeal.—As to cases at law in which judgment has been rendered and the right of appeal exists, a statute thereafter enacted which purports to confer a right upon the appellee which it is not possible for the appellant to enjoy, and to place a burden upon the appellant to which it is not possible that the appellee can be subjected, namely, the right of the appellee alone to have the facts again reviewed on appeal in case the determination in the lower court upon the facts was adverse to him, is a manifest violation of the constitution as conferring upon the appellee a special privilege and denying to the appellant an equal protection of the law. (p. 317.)

CONSTITUTIONAL LAW—Special Legislation.—Laws are general and uniform when alike in their operation upon all persons in like situation, and legislation which applies only to a certain class in the community is not necessarily special legislation within the meaning of a constitutional prohibition. (p. 317.)

CONSTITUTIONAL LAW—Special Legislation.—If a law is made applicable only to one class of individuals, to be valid, there must be some actual, substantial difference between the individuals so classified and other individuals in the state or community, when considered with reference to the purposes of the law. The class upon which the benefit is conferred must be composed of individuals possessing in common some disability, attribute or qualification, or in some condition making them proper subjects in whom to vest the specific right granted them. (pp. 317, 318.)

CONSTITUTIONAL LAW—Statutes Operating on Remedy.—If a statute is otherwise violative of the constitution, the mere fact that it operates directly upon the remedy, and not directly upon the right, does not remove the objection. (p. 319.)

J. W. D'Arcy, for the plaintiff in error.

Snapp, Heise & Dibell, R. A. Jackson and B. S. Cable, for the defendant in error.

³⁰³ SCOTT, J. The plaintiff in error brought a suit in the Will county circuit court against the defendant in error

to recover damages for a personal injury, occasioned, according to the averments of the declaration, by negligence of the defendant in error. The general issue was interposed, trial was had and a verdict returned finding the defendant guilty and assessing the damages at sixteen hundred dollars. A judgment was rendered upon the verdict on October 27, 1905. From that judgment the railway company prosecuted an appeal to the appellate court for the second district. That court, upon consideration of the evidence, found, as a matter of fact, that the railway company was not guilty of the neglect charged against it, and on August 6, 1907, reversed the ³⁰⁴ judgment of the circuit court without remanding the cause. That finding of fact was incorporated in the judgment of the appellate court. Jones brings the case to this court by writ of error, and the principal assignment of error, and that upon which the case made in this court depends, is in the following words: "The appellate court erred in its finding of fact adversely to plaintiff in error."

In this class of cases, prior to July 1st of the present year, this court was without power to review the determination of the appellate court upon controverted questions of fact: Hurd's Stats. 1905, c. 110, sec. 90; Lake Shore etc. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33. The present legislature, however, passed an act in relation to practice and procedure in courts of record which became effective on July 1st of this year (Sess. Laws 1907, p. 443). by which an attempt was made to change the law in this respect in certain instances.

Section 122 of that act reads as follows: "The supreme court shall re-examine cases brought to it by appeal or writ of error from the appellate courts, as to questions of law only, except as otherwise provided in this act; and, in the cases aforesaid, no assignment of error shall be allowed calling in question the determination of the inferior or appellate courts upon controverted questions of fact therein."

Section 120 of that act is in these words: "If any final determination of any cause or proceeding whatever except in chancery shall be made by the appellate court, as the result wholly or in part of the finding of the facts, concerning the matter in controversy, different from the finding of the court from which such cause or proceeding was brought by appeal or writ of error, it shall be the duty of such appellate court to recite in its final order, judgment or decree,

the facts as found; and the judgment of the appellate court shall be final and conclusive as to all matters of fact in controversy in such cause or proceeding: Provided, in actions at law where the appellate court reverses ³⁰⁵ the judgment of the trial court without awarding a trial de novo, as the result wholly or in part of finding the facts different from the finding of the trial court, and in cases where the justices of the appellate court are divided in opinion on the law or facts, and the cause is taken by appeal or writ of error to the supreme court, then the provision that the judgment of the appellate court shall be final as to the facts shall not apply, and both the facts and the law shall stand for review in the supreme court as in the appellate court."

It is under the provisions of the section last quoted that plaintiff in error seeks to have the appellate court's determination of facts reviewed in this court. The constitutionality of that statute is questioned in so far as it attempts to confer upon this court power to review the facts where the appellate court finds the facts against the appellee and reverses the judgment of the trial court without awarding a trial de novo. The provision of that section which applies where the judges of the appellate court are divided in opinion is not relevant to the present litigation, and will be disregarded in determining whether or not that section, in so far as it bears upon this case, is a valid enactment. The effect of the statute is to make the appellate court's determination of controverted facts nonreviewable if it determines the facts against the appellant in that court, and to make that determination reviewable if it determines the facts against appellee. In other words, if that court determines the facts one way the determination shall be reviewable; if it determines them the other way, the determination shall not be reviewable.

Section 22 of article 4 of the constitution of 1870 provides, among other things, that "the General Assembly shall not pass local or special laws in any of the following enumerated cases—that is to say: for granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

³⁰⁶ Under the law as it stood when judgment was entered in the circuit court, if the case was taken to the appellate court, any finding of fact made by that court would not be reviewable in this court. Prior to the time the cause was

decided in the appellate court the present practice act went into effect, and under its provisions if that court found the facts against the appellee the appellee had the right to have the determination reviewed by this court. The question arises, Is that enactment a special law conferring a special privilege upon plaintiff in error?

The words "privileges and immunities" are made use of in the constitution of the United States and in various state constitutions. The meaning of those words where so used has been considered by the courts. In the Slaughter-house Cases, 16 Wall. 36, 21 L. ed. 394, in construing the fourteenth amendment to the constitution of the United States, it was held that the "privileges and immunities" mentioned in that amendment were inclusive of all the rights which the state governments were created to establish and secure, and we have no doubt that it is in this broad sense that the words "privilege" and "immunity" are used in the clause of our constitution above quoted, and that they include every right which can be conferred or granted by any law of the state. By that provision of our constitution a guaranty is given that all valid enactments of the legislature shall be uniform in their operation upon persons and property, and by it all citizens are assured the equal protection of the laws of the state.

In Cooley on Constitutional Limitations (sixth edition, pages 481-483), it is said: "A statute would not be constitutional . . . which should select particular individuals from a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt." That language has been quoted and approved by this court: Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007, 52 L. R. A. 283; Mathews v. People, 202 ³⁰⁷ Ill. 389, 95 Am. St. Rep. 241, 67 N. E. 28, 63 L. R. A. 73; Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938.

In Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, this court referred with approval to the language originally used in Wally's Heirs v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511, which reads as follows: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and every partial or private

law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community and those who made the law by another, whereas a like general law, affecting the whole community equally, could not have been passed."

In *Sanitary District v. Bernstein*, 175 Ill. 215, 51 N. E. 720, we said: "Every citizen has an equal right with every other to resort to the courts of justice for the settlement and enforcement of his rights, and it is true that a discrimination between different classes of litigants which is merely arbitrary in its nature is a denial of that right and of the equal protection of the law."

When the judgment was entered in this cause in the circuit court the status of the parties in the appellate court in case an appeal was prosecuted or writ of error sued out was fixed—that is to say, if the case went there by appeal, as it did go, the railway company would necessarily be appellant. There was no method after that time, or after July 1st of this year, by which it was possible for it to become an appellee in that court. When the statute became effective, if it was valid, a right was conferred upon the appellee in the suit in the appellate court which it was not possible for the appellant to enjoy and a burden was placed upon appellant to which it was not possible that the appellee could be subjected, viz., the right of the appellee in that ³⁰⁸ court to have the facts again reviewed in this court, in case the determination of that court, on the facts, was adverse to the appellee. According to the authorities above cited that was a manifest violation of the constitution, unless appellee was one of a class upon which the legislature might properly confer that right while denying it to appellant.

Legislation which applies only to a certain class in the community is not necessarily special legislation, within the meaning of the fundamental law of the state. Laws are general and uniform when alike in their operation upon all persons in like situation. When a law is made applicable only to one class of individuals, however, there must be some actual, substantial difference between the individuals so classified and other individuals in the state or community, when considered with reference to the purposes of the legis-

lation. The class, if the law confers a benefit upon it, must be composed of individuals possessing in common some disability, attribute or qualification, or in some condition marking them as proper objects in whom to vest the specific right granted unto them: *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624, 32 L. R. A. 445; *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007, 52 L. R. A. 283; *Horwich v. Walker-Gordon Laboratory Co.*, 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938. Members of the medical profession may properly be placed in one class, and constitutional laws applicable to that class alone, relating to the practice of medicine, may be enacted, but a statute regulating the descent of property could not be valid if it applied only to that class. Can it be said that parties who, prior to the time this statute went into effect, had been successful in obtaining a judgment in the nisi prius courts and whose cases had not been reviewed by the appellate court, as distinguished from the unsuccessful parties in the same litigation, possess any attribute, qualification or disability, or are in any condition that marks them as the proper objects of legislative favors of the character conferred by this statute?

It is possible that the appellees or defendants in error whose cases had been determined in the court of original ³⁰⁰ jurisdiction and had not yet been reached in the appellate court might form a proper class to which, alone, certain new legislation should be applicable, as, for example, statutes in reference to the payment or advancement of costs in the appellate court, or in reference to the time within which such appellees or defendants in error could assign cross-errors, or in reference to the time within which they would be entitled to mandates from that court in case they were successful there. But this statute is one of different character, and its constitutionality depends upon entirely different considerations. When the judgment of the circuit court was entered, either party in whose favor the appellate court might thereafter determine the facts had the right to have that finding stand without review by this court. Both parties to the litigation were in the same class so far as this question was concerned. They were classified by the fact that they are litigants in a case where the appellate court had the power to make a nonreviewable determination of the controverted facts, and there was nothing that marked the

appellee in that court as a member of a particular class upon which the legislature might legitimately confer the additional right in reference to the final adjudication of the facts in the case which this statute seeks to give. The discrimination which this law attempts to make between the parties to this suit is purely arbitrary.

Counsel for plaintiff in error contends that this statute should be held constitutional upon the authority of *Chicago etc. R. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406, for the reason that it was there decided that the legislature might properly determine in what class of cases the judgment of the appellate court should be final, excepting, of course, the four classes of cases in which an appeal from the appellate court to this court is guaranteed by the constitution. The answer to that argument is, that this statute is not one determining in what class of cases the judgment of the appellate court shall be final, but is a statute providing that ³¹⁰ if the appellate court determines the facts in a case to be one way, its judgment as to the facts is final, but that if it determines the facts in the same case to be the other way, its determination is not conclusive of the facts. The case so relied upon by plaintiff in error is not in point.

Nor is the fact that the statute is one which applies to the remedy or regulates the practice significant. Where a statute is otherwise violative of the constitution, the mere fact that it operates directly upon the remedy and not directly upon the right does not remove the objection. "Remedies are the life of rights and are equally protected by the constitution": *Board of Education v. Blodgett*, 15 Ill. 441, 46 Am. St. Rep. 348, 40 N. E. 1025, 31 L. R. A. 70.

In *Kerfoot v. Cromwell Mound Co.*, 115 Ill. 502, 25 N. E. 960, in discussing the question of the constitutionality of the statute which made the judgment of the appellate court upon the facts conclusive, this court considered the statute determining whether the facts should be reviewed in this tribunal as a law regulating the practice, merely, and it was there said that the court was aware of no case holding that parties have a "constitutional or vested right in the practice governing courts" except as to the right of trial by jury, and that "it has never been held that the legislature has no power to alter the practice of the courts of the state." That case does not control here, because the statute there under

consideration operated equally upon the rights of both the parties to any particular cause.

This statute as to the present litigation, in so far as it attempts to vest in this court the power to determine the facts, is a special law conferring a special right or privilege upon the plaintiff in error, and it cannot be here applied. The constitution forbids. Whether the statutory provision in question can be regarded as a valid enactment with reference to cases in which the final judgment in the nisi prius court is of a date later than the time when the act of which it is a part went into effect is now being considered by this court and will no doubt be determined at the present term.

⁸¹¹ There is no ground for the contention that the appellate court erred in applying the law to the facts of this case as it found the facts to be. Our determination of the constitutional question necessarily leads to an affirmance.

The judgment of the appellate court will be affirmed.

The Legislature is Competent to Enact Statutes applicable to one class of persons only, if the classification is based upon intrinsic differences requiring different legislation. But classification, to be a basis for valid legislation, must be reasonable and founded upon real differences. There can be no arbitrary discriminations: See *Ex parte Sohncke*, 148 Cal. 262, 113 Am. St. Rep. 236, and cases cited in the cross-reference note thereto. For the application of these principles to statutory regulation of rules of procedure and civil remedies, see *Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73; *Continental Fire Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916; *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638; *Burk v. Putnam*, 113 Iowa, 232, 86 Am. St. Rep. 372; *Gano v. Minneapolis etc. R. R. Co.*, 114 Iowa, 713, 89 Am. St. Rep. 393.

PEOPLE v. STEELE.

[231 Ill. 340, 83 N. E. 236.]

THEATERS—Right to Regulate and License.—The state has a right by statute to regulate a theater as a place of public amusement, and may require a license fee for the privilege of conducting the business. (p. 323.)

THEATERS—Right to License and Regulate.—The legislature has the same authority over the theater business as over any other lawful private business, and no more. Besides the requirement of a license, it may interfere with and regulate the business to the extent that the public health, safety, morality, comfort and general welfare require. (p. 323.)

POLICE POWER—Determination of What are Subjects of.—While the legislature may determine when the exigency exists for the exercise of the police power, it is for the courts to determine what are the subjects for the exercise of such power. (p. 324.)

CONSTITUTIONAL LAW—Regulation of Business—Police Power.—To uphold a statute regulating a lawful private business, the court must be able to see that the act tends in some degree to the prevention of offenses, or the preservation of the public health, morals, safety or welfare, and it must be apparent that such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. (p. 324.)

THEATERS—License Fee—Change in Character of Business.—The requirement of a license fee for the privilege of conducting a theater does not change the character of that business from a private one to one impressed with a public interest. (p. 325.)

CONSTITUTIONAL LAW—Scalping Theater Tickets.—A statute prohibiting the sale of a ticket by a manager of a theater without the requirement on its face that it shall not be resold at an advance, prohibiting the sale of a ticket at an advance, and prohibiting the keeping of a place for such sale, is not a valid exercise of the police power, and is unconstitutional and void as imposing arbitrary and burdensome restrictions, not required by the public welfare, upon the right of the theater manager as to the manner in which he must conduct his business, and the contracts he shall make in carrying it on, and as prohibiting a broker from selling at a profit the tickets which it is his business to sell, and as depriving both of their property and liberty without due process of law. (p. 330.)

Moran, Meyer & Meyer, for the plaintiff in error.

W. H. Stead, attorney general, J. J. Healy, state's attorney, and J. J. Barbour, for the people.

343 DUNN, J. These cases have been submitted together by agreement. The plaintiffs in error were convicted in the municipal court of Chicago of violations of the act approved June 4, 1907, "to prohibit the sale of tickets for more than the price printed thereon, for theaters, circuses and places

of amusement, and declaring same a misdemeanor, and fixing the penalties therefor, and to repeal a certain act herein named": Laws 1907, p. 269. Writs of error have been sued out of this court, and the only question presented is the constitutionality of that act.

It is conceded that the plaintiff in error Steele, being the manager of a theater, has violated section 1 of the act by selling a ticket not having printed thereon, "This ticket cannot be sold for more than the price printed hereon," and that plaintiff in error Altschul has violated section 2 of the act by demanding and receiving for the sale of a ticket a price in excess of the advertised or printed rate therefor, and has violated section 3 by establishing an agency for the sale of tickets at a price greater than that asked at the box-office and in excess of the advertised or printed rate therefor. It is therefore conceded that if the act is a valid enactment, the judgments of the municipal court should be affirmed.

The particular constitutional limitations which plaintiffs in error contend are infringed are contained in sections 1, 2 and 14 of article 2 of the constitution. Those sections are as follows:

"Sec. 1. All men are by nature free and independent, and have certain inherent and inalienable rights—among ³⁴⁴ these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

"Sec. 2. No person shall be deprived of life, liberty or property, without due process of law."

"Sec. 14. No ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

The contention of plaintiffs in error is, that the right to engage in any lawful business, and the right to enter into any contracts proper and convenient for carrying on a lawful business, are property; that the business of selling theater tickets and that of conducting a theater are lawful; that the act in question takes away the right of the ticket seller and the freedom of contract of the manager of the theater, and so deprives them of their property without due process of law, and of the liberty of following such avocation as may seem best to them, and of entering into such contracts as they may deem proper and essential therein.

The right of the state to regulate theaters and all places of public amusement is universally recognized. It is important that places where people assemble in numbers should be subject to regulations for the preservation of peace, good order, morality and safety. In respect of the power of the legislature to tax or license it, the business of conducting a theater is in no different condition from any other business. The legislature may impose a tax upon or require a license fee for the exercise of any avocation. "The constitution has not prohibited the General Assembly from imposing or authorizing the imposition of the duty to procure a license to pursue any calling, nor has it limited the power or limited its exercise": *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560. The legislature has the same authority over the theater business as over any other lawful private business, and no more. Besides the requirement ³⁴⁵ of a license, it may interfere with and regulate the business to the extent that the public health, safety, morality, comfort and general welfare require. This is the exercise of the police power which this court has said may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society: *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230. In *Toledo etc. Ry. Co. v. City of Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611, it was held that if the law prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, comfort, safety or welfare of society, it will in such case be an unauthorized exercise of power, and it will be the duty of the courts to declare such legislation void. In *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79, it was said: "The police power of the state is that power which enables it to promote the health, comfort, safety and welfare of society. It is very broad and far-reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the constitution, and must have some relation to the ends sought to be accomplished—that is to say, to the comfort, welfare or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end. It cannot invade the rights of person and property under the

guise of a mere police regulation when it is not such in fact; and where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety and welfare of society."

While the legislature may determine when the exigency exists for the exercise of the police power, it is for the courts to determine what are the subjects for the exercise of this power, and it is necessary that the act should have ³⁴⁶ some reasonable relation to the subjects of such power. The court must be able to see that the act tends in some degree to the prevention of offenses or the preservation of the public health, morals, safety or welfare. It must be apparent that such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose: *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707, 48 L. R. A. 26; *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

"Liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare": *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62, 22 L. R. A. 340; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707, 48 L. R. A. 26. "The right of every man to choose his own occupation, profession or employment, though not expressly guaranteed by the constitutions, is included in the right to the pursuit of happiness": *Black on Constitutional Law*, p. 411. The privilege of contracting is both a liberty and a property right, and is protected by the constitution: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79; *Bailey v. People*, 190 Ill. 28, 83 Am. St. Rep. 116, 60 N. E. 98, 54 L. R. A. 838; *Booth v. People*, 186 Ill. 43, 78 Am. St. Rep. 229, 57 N. E. 798, 50 L. R. A. 762.

The statute prohibits the sale of a theater ticket at a price above the printed rate, and prohibits the establishing of an agency for such sale. There is nothing immoral in the sale of theater tickets at an advance over the price at the box-

office. Such sale is not injurious to the public welfare and does not affect the public health, morals, safety, comfort or good order. It does not injure the buyer or the proprietor of the theater. The buyer purchases voluntarily. He is under no compulsion. If the conducting of a theater is a mere private business, there is no reason why the proprietor may not sell the tickets when and where, at what prices and on what terms he chooses. It is insisted, ³⁴⁷ however, that the operation of a theater is a business affected with a public interest and therefore is subject to control by the legislature. It is a well-established doctrine that where the owner of property has devoted it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, so long as such use is maintained: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 177; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 75 Am. St. Rep. 184, 56 N. E. 822, 48 L. R. A. 568; *New York and Chicago Stock Exchange v. Board of Trade*, 127 Ill. 153, 11 Am. St. Rep. 107, 19 N. E. 855, 2 L. R. A. 411. The fact that a license is required does not make the business a public employment. The cases where a business has been regarded as affected with a public interest have been cases where the person or corporation engaged in the business was acting under a franchise or cases affecting trade and commerce, where either there has been a virtual monopoly of means of transportation or methods of commerce (*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 177), or where, from the nature of the business, in its regular course, the person carrying it on was necessarily intrusted with the property or money of his customers (*Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303, 35 L. R. A. 176; *Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 55 N. E. 663, 47 L. R. A. 802); or where the business has been conducted in such a manner that the public and all persons dealing in the products concerned have adapted their business to the methods used, so that such methods have become necessary to the safe and successful transaction of business: *New York and Chicago Stock Exchange v. Board of Trade*, 127 Ill. 153, 11 Am. St. Rep. 107, 19 N. E. 855, 2 L. R. A. 411; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 75 Am. St. Rep. 184, 56 N. E. 822, 48 L. R. A. 568.

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, where it was claimed that the business of mining for coal was affected with a public use, and subject, therefore, to regulation by law, the court said (page 303): "It cannot be claimed that mining for coal was by the common law affected with a public use, and therefore specially regulated by law, like the business ³⁴⁸ of innkeepers, common carriers, millers, etc., and in our opinion it is not, like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood or turf, or even to the owners of grain, domestic animals, or to those owning any of the other ordinary necessities or conveniences of life which form a part of the commerce of the country."

In *Horney v. Nixon*, 213 Pa. 20, 110 Am. St. Rep. 520, 61 Atl. 1088, 1 L. R. A., N. S., 1184, the plaintiff brought a suit in trespass against the defendant for wrongfully refusing to permit him to occupy a seat which he had purchased for a theatrical performance. The court held that his only remedy was an action for the breach of the contract, and said: "The proprietor of a theater is a private individual engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply and be willing to pay for a ticket, for the theater proprietor has acquired no peculiar rights and privileges from the state, and is therefore under no implied obligation to serve the public."

In *Collister v. Hayman*, 183 N. Y. 250, 111 Am. St. Rep. 740, 76 N. E. 20, 1 L. R. A., N. S., 1188, the court said: "A theater may be licensed, like a circus, but the license is not a franchise, and does not place the proprietors under any duty to the public or under any obligation to keep the theater open. . . . The defendants were conducting a private business, which, even if clothed with a public interest, was without a franchise to accommodate the public, and they had the right to control it the same as the proprietor of any other business, subject to such obligations as were placed upon them by the statute hereinafter mentioned. Unlike a carrier of passengers, for instance, with a franchise from the state, and hence under obligation to transport anyone who applies and to continue the business year ³⁴⁹ in and year out, the pro-

prietors of a theater can open and close their place at will and no one can make lawful complaint. They can charge what they choose for admission to their theater. They can limit the number admitted. They can refuse to sell tickets and collect the price of admission at the door. They can preserve order and enforce quiet while the performance is going on. They can make it a part of the contract and a condition of admission, by giving due notice and printing the condition in the ticket, that no one shall be admitted under twenty-one years of age, or that men only or women only shall be admitted, or that a woman cannot enter unless she is accompanied by a male escort, and the like. The proprietors, in the control of their business, may regulate the terms of admission in any reasonable way. If those terms are not satisfactory, no one is obliged to buy a ticket or make the contract."

The defendant in error refers to the case of *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050, and the same case on a subsequent appeal (*Western Turf Assn. v. Greenberg*, 148 Cal. 126, 113 Am. St. Rep. 216, 82 Pac. 684, 204 U. S. 359, 27 Sup. Ct. Rep. 384, 51 L. ed. 520), as supporting the proposition of the right of the legislature to enact a statute of the kind in question. The statute of California provided that it should be unlawful for the proprietor of a place of amusement to refuse admittance to any person over the age of twenty-one years presenting a ticket of admission acquired by purchase, provided that any person under the influence of liquor, guilty of boisterous conduct or of lewd or immoral character might be excluded. The supreme court of California upheld the constitutionality of the act as a valid exercise of the police power to regulate places of amusement. The supreme court of the United States affirmed the judgment, saying in the course of the opinion: "It is only a regulation compelling it to perform its own contract, as evidenced by tickets of admission issued and sold to parties wishing to attend its racecourse. Such a regulation, in itself just, is likewise promotive of peace ³⁵⁰ and good order among those who attend places of public entertainment or amusement. It is neither an arbitrary exertion of the state's inherent or governmental power nor a violation of any right secured by the constitution of the United States. The racecourse in question being held out as a place of public entertainment and amusement, is by the act of the defendant so

far affected with a public interest that the state may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute."

The supreme court of California, in *Ex parte Quarg*, 149 Cal. 79, 117 Am. St. Rep. 115, 84 Pac. 766, 5 L. R. A., N. S., 183, refused to carry the doctrine to the extent sought for it in this case, and expressly held unconstitutional and void a statute making it a misdemeanor to sell or offer for sale a theater ticket at a price in excess of that charged originally by the management. The court said: "The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application, and which tend in some appreciable degree to promote, protect or preserve the public health, morals or safety or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power. The sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral or injurious to public welfare or convenience than is the sale of any ordinary article of merchandise at a profit."

There can be no doubt of the right of the legislature to require theaters to take out a license and to regulate their management so far as the public welfare requires. "Natural ³⁵¹ persons were born with the right to peddle, auction, follow the business of brokers, hawking, merchants, commission-men, showmen, jugglers, innkeepers, grocery-keepers, liquor dealers, to establish toll bridges, ferries, etc., and most, if not all, of these occupations have been pursued in all ages, in all countries and in all conditions of men, from the savage to the most civilized; yet all civilized governments have controlled them, and required persons, for the public good, to pay for and procure a license to follow these various avocations. The power has been exercised in this state from its very organization almost, without question. If this power may be successfully challenged, it would seem to be doubtful what power might not be, with equal reason. The legislature may exercise all power not prohibited, and unques-

tionably all legislative power not limited by the fundamental law": Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560. The power is, however, limited by the fundamental law. The legislature may not prohibit any one of these avocations at its mere pleasure. It may not arbitrarily impose any vexatious burdens on the pursuit of any of these avocations. Whatever restrictions are required in the interest of public morals, health, security or welfare the legislature may impose, and no other. And the same with the business of conducting a theater. To impose burdensome restrictions, not required for the public welfare, on the right of the manager as to the conduct of his business and the contracts he shall make in carrying it on, is to deprive him of the liberty guaranteed to him by the constitution; to prohibit the broker from selling at a profit the tickets which it is his business to sell, deprives him of his property and his liberty.

The act prohibits a sale of a ticket by the manager of a theater without the requirement on its face that it shall not be resold at an advance, it prohibits the sale of a ticket at an advance, and it prohibits the keeping of a place for such sale. If the manager finds it profitable to have tickets on ³⁵² sale at different places, he may not sell at the regular price to brokers who maintain offices at such places and get their expenses and profits out of the advance in price on their resale of the tickets. The broker's business is prohibited because it has been made unlawful to make a profit. The public is no better nor worse off in health, morals, security or welfare. These are arbitrary and unreasonable interferences with the rights of the individuals concerned. The business of the broker in theater tickets is no more immoral or injurious to the public welfare than that of the broker in grain or provisions. If he does not make the price satisfactory to intending purchasers, they are under no compulsion to buy. They have no right to buy at any price except that fixed by the holder of the ticket. The manager may fix the price arbitrarily and may raise or lower it at his will. Having advertised a performance, he is not bound to give it, and having advertised a price, he is not bound to sell tickets at that price. It is immaterial to determine whether a theater ticket is either transferable or revocable. The fact is, that the bearer of the ticket is admitted to the performance. The business of dealing in theater tickets is carried on to some extent at least, and the right to do so

and to contract in regard to such tickets is a right in which those who use it are entitled to be protected. Nor is the civil rights act material, for there arises no question of the denial of equal rights. Though the manager sells all his tickets at one price, it may be a valuable right to sell to the broker.

It was held in the case of *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948, 24 L. R. A. 152, that a statute making it unlawful for any person not duly authorized by a railroad company to sell a ticket was a valid enactment. But a railroad company has a franchise from the state, and the manner in which its business as a carrier shall be conducted is clearly under the control of the legislature. The proprietor of a theater stands on an entirely different footing.

³⁵³ The act in question cannot be justified as a police regulation and was not within the power of the legislature to enact. The judgments of the municipal court are therefore reversed.

In the Subsequent Case of *City of Chicago v. Powers*, 231 Ill. 560, 83 N. E. 240, it was decided, on the authority of the principal case, that a city ordinance prohibiting speculating in or "scalping" theater tickets was unconstitutional and void. Mr. Justice Dunn, delivering the opinion of the court, said: "In the case of *People v. Steele* (231 Ill. 340, ante, p. 321, 83 N. E. 236), it was decided that an act of the legislature having the same purpose as the ordinances involved in these cases was invalid because beyond the constitutional power of the legislature. Under the decision in that case the ordinances in question here were invalid, and the judgments were properly rendered for the defendants."

The Law Applicable to Theaters is the subject of a note to *Sigel's Estate*, 110 Am. St. Rep. 525. The proprietor of a theater has the right to impose and enforce a regulation that if a ticket is sold on the sidewalk, admission on it may be refused at the door: *Collister v. Hayman*, 111 Am. St. Rep. 740. And a statute making it unlawful to refuse admission to a proper person holding a ticket to any place of public amusement, and entitling him, if refused admission, to recover his actual damages and one hundred dollars in addition thereto, is constitutional: *Greenberg v. Western Turf Assn.*, 148 Cal. 126, 113 Am. St. Rep. 216. But a statute forbidding the sale of theater tickets at a higher price than paid for them infringes the right of property guaranteed by the constitution: *Ex parte Quarg*, 149 Cal. 79, 117 Am. St. Rep. 115.

HEALY v. DEERING.

[231 Ill. 423, 83 N. E. 226.]

JUDGMENTS Affecting Streets—Res Judicata.—A judgment by a court having jurisdiction that plaintiffs are the owners in fee of land claimed by a defendant city as a street, and enjoining it from interfering with the plaintiff's possession and use of such land, is binding as res judicata upon the public in the absence of fraud. (p. 335.)

JUDGMENTS Affecting Streets—Parties.—In a suit instituted by an individual to establish his title to, and recover the possession of land claimed by a city as a public street, it is not necessary that both the city and the people of the state should be made parties to the suit to make the judgment binding upon the public. If the city is a party, the public is bound by the judgment. (pp. 335, 336.)

JUDGMENTS Affecting Streets—Parties—City as Representative of People.—In an action involving the existence of a street, a city, as a party to the suit, is the representative of the public, who are privies, and a judgment therein, not the result of fraud nor collusion, is binding upon the people. (p. 336.)

JUDGMENTS—Consent Decree, Who Bound by.—A judgment by consent of the parties is binding upon them and upon their privies, and cannot be reversed, impeached, or set aside by a bill of review, or bill in the nature of a bill of review, except for fraud. (p. 338.)

T. H. Stevenson, for the appellant.

W. D. Barge, G. W. Miller and E. W. Brundage, corporation counsel, for the appellee, the city of Chicago.

E. A. Bancroft and V. A. Remy, for other appellees.

⁴²³ **FARMER, J.** In September, 1888, Edmund M. Ferguson caused a tract of land owned by him in Cook county, lying partly in the city of Chicago and partly in the city of Lake View, to be laid off into lots and blocks, streets and alleys, surveyed and platted as Clybourn avenue addition to Lake View and Chicago. Block 6 of said addition contained twenty-six lots. Lots 1 to 18, inclusive, fronted north on Oakdale avenue. Lots 19 to 23, inclusive, each had twenty-five feet front and lot 24 two hundred and thirty-five feet front. These last-named lots all fronted east and abutted upon a strip of land thirty-three feet wide, designated on ⁴²⁴ the plat as Leavitt street. Between lots 23 and 24, and extending westward through said block 6 to Oakley avenue, a strip of land twenty feet wide was designated on the plat as an alley. The east line of the thirty-three feet designated as Leavitt street was the east boundary of the land platted

by Ferguson. The plat was filed for record October 4, 1888. By its execution and recording the owner of the land dedicated to the public use the streets and alleys shown on the plat.

The bill in this case was filed in the name of John J. Healy, state's attorney of Cook county, upon the relation of George F. Koester and Henry G. Zander, "residents, citizens and electors of the city of Chicago, county of Cook and state of Illinois." After setting out the execution and recording of the plat, the bill alleged it was duly approved by the city of Lake View and the city of Chicago, and that each of said municipalities accepted the portions of streets and alleys within its limits, and that thereafter they were publicly used, improved, treated and considered as public streets and alleys until July 15, 1889, when the territory comprising the city of Lake View was annexed to and became a part of the city of Chicago, whereby the said city of Chicago became vested with the fee simple title to all the streets and alleys in the said addition for the uses and purposes for which they were dedicated, and that said Leavitt street was treated and improved by said city and used by the public generally as a public street. The bill alleges that lots 20 to 24, inclusive, have no street frontage except upon Leavitt street; that lot 25 fronts on the twenty-foot alley running east and west and has no street frontage, and that said alley is the only direct and easy grade outlet to Leavitt street from lots 25 and 26.

The bill further alleges that March 22, 1902, Charles Deering, James Deering and Richard F. Howe, having by mesne conveyances become the owners of lots 19 to 24, inclusive, being all that part of block 6 abutting on Leavitt ⁴²⁵ street, executed a pretended deed of vacation of said street the entire length of said block, also that portion of the alley between lots 23 and 24; that they caused said pretended deed to be recorded, and, claiming by virtue thereof said portion of said street and alley, proceeded to inclose the same and attempted to prevent the use thereof by the public, but were prevented from doing so by the city of Chicago, through its police force; that thereupon said Charles Deering, James Deering and Richard F. Howe, copartners under the name of "The Deering Harvester Company," filed their bill in equity in the superior court of Cook county claiming to own said portion of said Leavitt street and alley, and prayed the city of Chicago and its officers be enjoined from inter-

fering with their use of said property; that the city of Chicago entered its appearance and filed an answer claiming the property was a public street and alley, the title to which was invested in the city in trust for the public use, and denied the right of complainants to the relief sought. The bill further alleges the complainants to the said bill then entered into negotiations with the city of Chicago to secure the adoption of an ordinance allowing them to purchase from said city said portions of said street and alley; that this was finally agreed to by the city, and thereafter, on the 18th of July, 1904, in furtherance of said agreement, the city council of said city adopted an ordinance vacating said portions of said street and alley in consideration of the Deerings and Howe paying to the city five hundred dollars in cash and deeding it a strip of land thirty-three feet wide, extending from the south line of Oakdale avenue north a distance of about one block, as a part of Leavitt street.

Oakdale avenue ran east and west through Clybourn avenue addition, and its south line was the north boundary of the portion of Leavitt street sought to be vacated. From said south line of Oakdale avenue Leavitt street continued north to Clybourn avenue, its width as platted and dedicated ⁴²⁶ being thirty-three feet. This strip of land proposed to be conveyed to the city by the Deerings and Howe would give Leavitt street a width of sixty-six feet from the south line of Oakdale avenue north to Clybourn avenue. The ordinance recited the fact that a controversy had arisen between the Deerings and Howe and the city as to the ownership of the portion of Leavitt street and the alley sought to be vacated, and required the Deerings and Howe to make the conveyance and pay the five hundred dollars within thirty days. These requirements were complied with, and the bill alleges that in pursuance of said ordinance a consent decree was entered in the injunction suit, finding complainants in the bill to be the owners in fee simple of the portion of Leavitt street and the alley mentioned, and enjoining the city of Chicago, its officers, agents and servants, from interfering with complainants in the use and enjoyment of it. Said decree recites that the city of Chicago, for a valuable consideration given by the complainants, waived and released all errors and supposed errors, and agreed not to appeal from said decree or sue out a writ of error to review the same. The bill alleges that thereupon the Deerings and Howe, under

the name of "The Deering Harvester Company," took possession of the said portions of Leavitt street and said alley claimed to have been vacated, have caused the same to be assessed for taxation as private property, have paid the taxes thereon and excluded the public from the use thereof. The bill charges that the city had no authority to adopt said ordinance; that said ordinance shows on its face the vacation of the portion of the street and alley was intended to be made for private uses and purposes, and that it was ultra vires and void. The prayer of the bill is, that the deed of vacation made by the Deerings and Howe in March, 1902, also the ordinance and the decree rendered in the suit of the Deerings and Howe against the city of Chicago, be declared to be void and of no effect, and that said street and alley be decreed to be public highways of the city of ⁴²⁷ Chicago, and that defendants be ordered to remove all obstructions to the public use thereof. The superior court sustained a demurrer to the bill and dismissed it for want of equity, and from that decree this appeal is prosecuted.

⁴²⁹ It will be seen from the bill, the substance of which we have endeavored to set out, appellant's contention is that the attempted vacation of the street and alley by the city of Chicago was for the private use and benefit of private individuals, and if this be true, it is argued the ordinance and decree relied on are ineffectual to accomplish that purpose. The nature of a city's title and interest in its public streets, and the limitations upon the power conferred upon it by the legislature to vacate streets and alleys, has been so often and thoroughly passed upon by this court as to not require further discussion here. Some of the cases where these questions have been discussed are *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393, *Canal Commrs. v. Village of East Peoria*, 179 Ill. 214, 53 N. E. 633, *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223, *City of Mt. Carmel v. Shaw*, 155 Ill. 37, 46 Am. St. Rep. 311, 39 N. E. 584, 27 L. R. A. 580, *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473, and *People v. Atchison etc. Ry. Co.*, 217 Ill. 594, 75 N. E. 573.

In our opinion, however, this case cannot be disposed of by a determination of whether the city of Chicago exercised a reasonable discretion, within the limits of the power conferred upon it by the legislature, in the adoption of the ordinance. Appellant's bill alleges appellees instituted a suit

in chancery against the city of Chicago claiming the ownership of the property in dispute, and sets out in full the decree entered in that case. It appears from the decree the court had jurisdiction of the city of Chicago, ⁴³⁰ and the cause coming on to be heard upon the stipulation of the parties as to the facts, the parties being represented by their respective counsel, the court decreed appellees to be the owners in fee simple of the property in dispute, describing it particularly, and enjoined the city of Chicago from interfering with their use and enjoyment of it. A special ground of appellees' demurrer to appellant's bill in this case was, "that it appears by the complainant's bill that all the questions and issues therein presented have been presented, prosecuted and finally adjudicated by a court of competent jurisdiction in a suit between the same parties in interest and their privies." Appellant insists that said decree was not the result of the deliberation of the court upon a contested issue of facts, but was entered by consent of the corporation counsel of the city of Chicago, who acted under the direction of the city council of said city, and is therefore not binding upon the people. The bill here does not question the court's jurisdiction of the subject matter and of the parties, nor is there any allegation that the parties, or either of them, were guilty of any fraud in the procurement of said decree. The argument is made that the public was not fairly represented by the city in the suit wherein said decree was rendered; that the decree was consented to by the city of Chicago as a part of its plan to vacate, for the benefit of appellees, a portion of a public street and alley, and for that reason it is not *res judicata* against the public and the public is not affected thereby.

A city's relation to its streets and alleys is that of trustee for the use and benefit of the public, and in legal proceedings where the existence of a public street is involved the public may be represented by the city or by the attorney general or the state's attorney. If a suit is instituted by an individual to establish the title to and recover the possession of land claimed by a city to be a public street, it is not necessary that both the city and the people of the state should be made parties to the suit in order that the judgment ⁴³¹ may be binding upon the public. Neither is it necessary in an action to establish the existence of a public street that the people of the state and city should join as

plaintiffs. In such case, where the city is a party, it is the representative of the public. The people of the state are privies, and a judgment not the result of fraud and collusion is binding upon the people: *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207; *O'Connell v. Chicago Terminal R. R. Co.*, 184 Ill. 308, 56 N. E. 355; *State v. Rainey*, 74 Mo. 229.

A very clear discussion of the question will be found in *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54. In that case the suit was brought by the attorney general on behalf of the people, upon the relation of a citizen, claiming that certain land in the city of San Francisco had been lawfully dedicated to the public use as a public square, and had been entered upon by the defendant, Holladay, and the public use of the land obstructed by the erection of fences and buildings thereon. One of the defenses set up by Holladay in his answer was, that previous to the commencement of the suit he had brought an action against the city and county of San Francisco claiming title to the land and asking to have his title quieted as against the adverse claims of said city and county, and that in said proceedings, judgment was entered in his favor. The supreme court of California held that judgment was binding on the public, and said: "The city and county of San Francisco is a municipal corporation created by the legislature of the state, and has conferred upon it by the state full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued, and this necessarily includes the authority to maintain and defend all actions relating to its right to subject to the public use such squares or land claimed by it to have been dedicated for such purposes; and in an action brought by it for the purpose of vindicating and protecting the public rights in such squares, or land claimed as such, the state would be bound by the ⁴³² result, because in such action the city and county would, in fact, represent the people of the state by virtue of the authority given it to maintain such actions for the purpose of preserving the public rights of which it is the trustee. . . . And we see no reason why these same rights might not also be tried and determined in an appropriate action in which the municipality might be a defendant—as, for instance, ejectment, where it had ousted the claimant from the possession, or by injunction, where it threatened to remove his buildings or trees or a portion of the soil from

the land claimed by it as a public square; and the public would be bound by the final judgment therein if the action was conducted in good faith on the part of the city. The rule that the citizen shall not be twice vexed for the same cause of action is as binding upon the state as upon other litigants; and the legislature, in conferring upon the city power to maintain and defend in the courts the rights of the state to streets and squares within its limits must be presumed to have done so with reference to this well-known maxim, and to have intended that the state should be bound by the result of such litigation."

The cases determined by this court, above cited, did not so directly involve the precise question to be determined as did the California case, but they are analogous in principle and the rules announced in them are clearly in harmony with the Holladay case (93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54).

Appellant contends that the deed of vacation of the street and alley executed by the Deerings and Howe was invalid, and that they knew or believed this to be true is shown by the fact of their agreeing to deed the city the strip of land above described, paying five hundred dollars in cash and securing the adoption of the ordinance of vacation. The merits of the suit by appellees against the city to establish their claim to the land in dispute cannot be inquired into by us in this case. The decree recites that the facts were stipulated between the respective parties. In the absence of ⁴²³ charges of fraud and collusion in the bill in procuring the decree it is not subject to attack, either directly or collaterally. Nothing appears upon the face of it showing fraud or bad faith or that the court did not act advisedly.

In *O'Connell v. Chicago Terminal R. R. Co.*, 184 Ill. 308, 56 N. E. 355, certain parties filed a bill to enjoin the railroad company from constructing its roadbed across an alleged highway over certain premises in the village of Summit. Complainants denied the existence of the public highway, and on the trial offered in evidence a decree previously entered in a suit of Jane S. Martin against the village of Summit. That suit was a bill in chancery by Jane S. Martin denying the existence of the highway in question, and asking that the village of Summit be enjoined from further using it or prosecuting work on it as a highway. The decree found the allegations of the bill to be true that no such

highway as claimed by the village existed, and perpetually enjoined the village as prayed. This decree was objected to on the ground that the Chicago Terminal Transfer Railroad Company and its codefendants were not parties to that suit and the decree was therefore not binding on them. The objection was sustained, and this court held the ruling of the trial court in sustaining the objection to be erroneous, on the ground that the decree in the Martin case was an adjudication that the highway did not exist, and while the Chicago Terminal Transfer Railroad Company and its codefendants were not parties to that suit, they were privies to the decree and were bound thereby as conclusively as was the village of Summit. The court said (page 324): "In the Martin case the village of Summit was defendant, and claimed, as the representative of the public, to be the owner of the highway in question. Upon its organization the village succeeded to whatever rights the town of Lyons had in the highway. The decree in the Martin case adjudicated upon the rights of the village in and to this very highway. The appellees last above named are here claiming the right ⁴³⁴ to use this highway through an ordinance passed by the village of Summit, giving them permission to cross the highway. They set up no rights here except so far as they derive them from the village and its ordinance, as already described; hence they cannot be regarded otherwise than as privies, claiming in privity with the village of Summit. Their rights are therefore affected by the decree rendered in the Martin case. As that decree held that the village of Summit had no right to the public highway which is here claimed to exist, the village could not clothe these appellees with any right or interest in said highway. In order to succeed here under the issues made by the pleadings, appellees must establish the existence of the alleged highway, throughout its whole length, across the three lots 5, 4 and 3, and as the Martin decree stands in the way of the establishment of any such highway, the defense made by the appellees to this bill falls to the ground. It makes no difference whether the decree in the Martin case was a consent decree or not. Even if entered by consent of the village, it is binding upon those who are in privity with the village."

In the California case, before cited, the court expressed its conviction that the judgment in favor of Holladay and

against the city and county of San Francisco was wrong, but said "its force as an adjudication of the rights of the parties thereto and those in privity with them is not affected thereby." In *Knobloch v. Mueller*, 123 Ill. 554, 17 N. E. 696, it was held a decree entered by consent cannot be reversed, impeached or set aside by bill of review or bill in the nature of a bill of review, except for fraud. Appellant places great reliance upon *Jenkins v. Robertson*, L. R. 1 H. L. Sc. 117. But we do not think it conclusive in favor of appellant's position, and in the absence of allegations of fraud in procuring the decree in the suit of appellees against the city of Chicago, we think it clear, under the decisions of this court and the courts of other states in the Union, said ⁴³⁵ decree was binding upon the appellant, whether erroneous or not.

The decree of the superior court sustaining the demurrer and dismissing the bill is affirmed.

On Who are Bound by Judgments for or against a municipal or other governmental body or its officers, see the note to Henderson Co. v. Henderson Bridge Co., 105 Am. St. Rep. 204.

CHATTERTON v. CHATTERTON.

[231 Ill. 449, 83 N. E. 161.]

DIVORCE—Appeal After Death of Party Divorced.—The death of the plaintiff in a divorce suit before writ of review is sued out by the defendant does not destroy the marriage status so that there is no subject matter of which a court of review can assume jurisdiction. (p. 340.)

DIVORCE—Death of Party Divorced Prior to Appeal.—If the successful party to a divorce suit dies before appeal, it is not essential to the right to review the decree by writ of error that it appear from the record of the suit that the deceased left property in which the surviving husband or wife will take an interest upon the decree being reversed. (p. 340.)

DIVORCE—Appeal After Death of Party Divorced—Practice. Upon a writ of error to review a decree of divorce after the death of the successful party, it is proper to file in the appellate court an affidavit showing to whom the property of the deceased will pass under her or his will, and to make such persons defendants in error. (p. 340.)

DIVORCE—Appeal—Desertion.—A decree of divorce granted upon the ground of desertion is properly reversed where the record

fails to show that the desertion was willful, or without reasonable cause, as required by the statute. (p. 341.)

DIVORCE—Appeal by Writ of Error—Laches.—Upon a writ of error to review a decree of divorce, the defense or doctrine of laches does not apply, as the statute fixes the period within which the writ may be sued out. (p. 341.)

Wheelock, Shattuck & Newby, for the appellants.

T. M. Headen and G. I. Haight, for the appellee.

⁴⁵¹ SCOTT, J. The appellee moved to dismiss this appeal. That motion will be denied. In view of the determination which we have reached upon the merits of the controversy, we deem it unnecessary to state the reasons which led to a denial of the motion.

It is contended by appellants that the complainant in the divorce proceeding having died prior to the time when the ⁴⁵² writ of error was sued out of the appellate court, the marriage status was thereby forever destroyed and there was no subject matter of which a court of review could assume jurisdiction. This court has taken the contrary view in *Wren v. Moss*, 1 Gilm. 560, *Wren v. Moss*, 2 Gilm. 72, and *Danforth v. Danforth*, 111 Ill. 236. We are satisfied with the conclusions expressed in those cases.

It is then said, however, that such a decree will not in any event be reviewed unless it appears from the record that the party deceased left property in which the surviving husband or wife will take an interest upon the decree being reversed. If this be correct and the investigation of the court of review is confined strictly to the record made in the divorce suit, the right of the party against whom the decree passed to have the decree reviewed after the death of the successful party is of little practical worth, as it is not often that the record shows what, if any, property was owned by the party who has obtained the decree of divorce. In the case in 1 Gilm., above referred to, before the writ of error issued, the wife, against whom the decree of divorce had passed, filed in this court an affidavit showing to whom the property of the deceased husband would pass under his last will and testament, and the persons to whom that property would so pass were made defendants in error. Appellee pursued precisely the same practice in the appellate court in this case, and to this method of procedure we perceive no valid objection.

A certificate of evidence was taken, and one of the errors assigned by the appellee in the appellate court questions the sufficiency of the evidence thereby preserved to support the finding of the decree to the effect that appellee had been guilty of willful desertion without reasonable cause, as charged by the bill. Upon the hearing Martha S. Chatterton testified in her own behalf. The substance of her testimony upon this question is, that she was married to the defendant on August 13, 1868; that they resided together⁴⁵³ until four years ago "last May," and that since that time they have not lived together; that the last she heard of the defendant he was in California; that he did not support her the last year of the time they lived together and not very well before that time; that since he left her he had sent her but five dollars; that her father supported her during the last four years and had contributed materially to her support during all her married life; that as long as she and her husband lived together they were happy, but he was not a very good provider and wasted his money; that her father died "last November," and that shortly thereafter her husband sent her a letter of condolence. There is nothing in this testimony to show for what reason or with what intention her husband left her. In other words, there is no proof that the desertion was willful or that it was without any reasonable cause, as required by the statute: Hurd's Stats. 1905, c. 40, sec. 1. The only other evidence taken was that of Georgiana Chatfield and Horace G. Druery, which merely shows that during the preceding four years Mr. and Mrs. Chatterton had not lived together, and that she had lived with her father up to the time of his death, in the preceding November.

The appellate court correctly decided, as a matter of law, that there was in the record no proof "that the husband was guilty of willful desertion without reasonable cause." Appellants, in fact, do not contend that the evidence preserved warranted a decree for divorce, but they insist, relying principally upon *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082, that appellee has been guilty of such laches that he should not be permitted to secure a reversal of the decree. The case just referred to was a bill in equity to set aside a decree of divorce upon the ground that it had been obtained by fraudulent means and by a deception practiced upon the court. In this case the review of the decree of divorce was

sought by writ of error. The statute fixes the period within which that writ may be sued out. The doctrine of laches⁴⁵⁴ successfully invoked in *Evans v. Woodsworth* is without application here.

The appellate court was correct in refusing to remand the cause. As the complainant in the bill was dead, no further proceedings could be had in the circuit court: *Danforth v. Danforth*, 111 Ill. 236.

The judgment of the appellate court will be affirmed.

After the Death of a Plaintiff in whose favor a decree of divorce had been rendered, the court, in *Dwyer v. Nolan*, 40 Wash. 459, 111 Am. St. Rep. 919, held that it had no power to vacate the decree on the ground of want of jurisdiction over the defendant; but in *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193, the jurisdiction of equity to annul a decree of divorce, at the suit of a woman, after the death of her husband, who had obtained the decree, is recognized.

COHN v. SCOTT.

[231 Ill. 556, 83 N. E. 191.]

DIVORCE—Custody of Children.—In awarding the custody of a child to one of the parents in a divorce proceeding, the good of the child is the primary object, and due regard must be had as to the character and conduct of the parties in awarding the custody of the child. (p. 343.)

DIVORCE—Custody of Children—Discretion.—In awarding the custody of a child in divorce proceedings a very large discretion must be permitted to the chancellor; but it must be a judicial discretion, and is subject to review on the evidence heard in open court. (p. 343.)

DIVORCE—Custody of Children—Evidence Out of Court.—On the question of awarding the custody of a child to one of the parents in a divorce proceeding, the interests of the child cannot be bound by an agreement between counsel, that in addition to the evidence taken in open court, the chancellor may make a personal investigation of the character and home surroundings of one of the parties. (pp. 343, 344.)

The parties to this proceeding were divorced, and the sole care, custody and control of the child of their marriage was awarded to the father. The petition in this case was filed by the mother for a modification of the decree, so that she might have the custody of the child a portion of the time; the trial court so modified the decree, but the appellate court

reversed such decision, and the mother appealed to the supreme court. It was undisputed that the father was of good character and a proper person to have the custody of the child, and that the child was comfortably situated and well provided for, and that the mother was allowed to visit the child whenever she wished. Both of the parties have remarried, but it was shown that the mother, after the divorce was granted and before and after her remarriage, both gambled and drank to excess, and that she and her husband cursed and swore frequently and did considerable quarreling.

E. H. Morris, for the appellant.

Pease, Smietanka & Polkey, for the appellee.

558 Per CURIAM. The great weight of the evidence in this record upholds the conclusion reached by the appellate court that appellee is, both by character and financial ability, a fit person to have the care and custody of his child, while the evidence as to appellant's personal fitness tends to prove the contrary. In disposing of the custody of children the primary object should always be the good of the child: *Hewitt v. Long*, 76 Ill. 399; *In re Smith*, 13 Ill. 138. Parental example has great influence in the development of young children, and due regard should be had to the character and conduct of the parties in awarding children: 14 Cyc. 808, and authorities cited. The good of the child is the leading consideration, to which the claims of all other persons must yield: 2 Bishop on Marriage and Divorce, 5th ed., pars. 532, 541.

559 It is contended, however, that counsel agreed, after the evidence was heard in open court, that the chancellor himself should investigate the character of appellant and her home surroundings. It is very apparent from the record that he made no personal investigation. He expressly so said, but stated that from what he heard of the appellant's husband he was satisfied the child would not be injured in any way if placed in the custody of the mother.

Appellant relies upon the case of *Cowls v. Cowls*, 3 Gilm. 435, 44 Am. Dec. 708, as laying down the rule that it is proper for the chancellor who hears a proceeding of this kind to make a personal investigation and base his finding thereon. The part of the opinion relied on in that case was not necessary to that decision, and we do not think it bears the construction contended for by appellant. Even if it did, the chancellor in that case made no personal investigation out-

side of the evidence presented in court, and it is very apparent that the decision of the chancellor there, as well as the finding of the court, was based upon the facts in the record. While a very large discretion must be permitted the chancellor hearing these cases, yet it must be a judicial discretion and subject to review on the evidence heard in open court. The agreement of counsel cannot bind as to the interests of the minor, which is the paramount question in this proceeding. If the chancellor could decide partly on investigation made out of court, then the whole decision might rest upon such an investigation and could not be reviewed. Such is not the law.

The evidence shows beyond all question that the best interests of the child required it to remain in the custody of the father. No obstacle appears to have been put in the way of the mother to visit her son in the past, and we see no reason on this record why the original order as to the custody of the child should be modified.

The judgment of the appellate court will be affirmed.

In Awarding the Custody of a Child in divorce proceedings, the controlling consideration is the child's welfare: Dawson v. Dawson, 57 W. Va. 520, 110 Am. St. Rep. 800; Power v. Power, 66 N. J. Eq. 320, 105 Am. St. Rep. 653; Hernandez v. Thomas, 50 Fla. 522, 111 Am. St. Rep. 137, and cases cited in the cross-reference note thereto. The matter rests in the sound discretion of the court, subject to review on appeal upon the facts found: Harris v. Harris, 115 N. C. 587, 44 Am. St. Rep. 471. See, too, Neville v. Reed, 134 Ala. 317, 92 Am. St. Rep. 35. That the discretion of the court is a legal discretion, which should be guarded by the principles of law, and not by the fancies and notions of the judges, see Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

STATE v. ASBELL.

[74 Kan. 397, 86 Pac. 457.]

INDICTMENT—Omission of a Syllable.—An information charging the bringing of cattle into the state without an inspection by the livestock sanitary “commission,” when the word “commissioner” should have been used, is not fatally defective when it also charges the want of any inspection whatever. (p. 346.)

JUDICIAL NOTICE.—The Prevalance of *Boophilus Bovis*, or Southern Ticks, in the cattle country south of Kansas is a fact of common knowledge, of which the courts take judicial notice. (p. 347.)

CONSTITUTIONAL LAW—Statute Requiring Inspection of Livestock.—A statute prohibiting the bringing of cattle into the state from below its southern line at all seasons of the year unless inspected by some inspector authorized by the livestock commissioner or by the bureau of animal industry of the interior department of the United States, and passed under a health certificate, and making persons violating the statute guilty of misdemeanor and punishable, does not impose an unreasonable restraint upon interstate commerce. (p. 348.)

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C. C. Coleman, attorney general, and E. L. Burton, county attorney, for the state.

A. D. Neale, for the appellant.

³⁹⁷ BURCH, J. Appellant was convicted of a violation of the law relating to the inspection of cattle brought into the state from points beyond its south line. The information charged, among other things, that appellant brought cattle into the state from points south of its south boundary without having caused them to be inspected and passed under a certificate of health by the livestock sanitary commission of

(345)

the state, and that he did not have any inspection of them. This ³⁹⁸ pleading was attacked by a motion to quash and by a motion in arrest of judgment, on the ground that there is no longer any livestock sanitary commission in this state, the body formerly existing under that name having been superseded by a livestock sanitary commissioner, and that the general statement of a want of any inspection is insufficient.

There is no substantial difference between a commission composed of a body of individuals having lawful warrant to perform certain acts and a commissioner having identical authority. Both terms are general characterizations without fixed legal signification, and import an office with prescribed duties. It is therefore very technical to say that the omission of the terminal syllable "er" marks a fatal distinction between a single person having power by himself and his subordinates to inspect cattle and issue health certificates and all other men. Instead of this, it merely discloses a slightly imperfect description of a well-known state official. Of course, an information must state the offense charged with accuracy, precision and certainty; but it may do this in general terms: *State v. Finley*, 6 Kan. 366. The question is, Could the accused have been misled? *State v. McCord*, 8 Kan. 232, 12 Am. Rep. 469. Hence, if the defect noted were serious, the general negative of any inspection whatever fairly apprised appellant of the charge he was required to meet. Although this allegation was probably inserted for the purpose of showing a want of inspection by an inspector as distinguished from the commissioner, it is broad enough to cover all persons; and whenever a negative is to be expressed general terms covering the entire subject matter will suffice: 1 Bishop's New Criminal Procedure, sec. 641.

The action was instituted under section 27 of chapter 495 of the laws of 1905, which reads as follows:

"It shall be unlawful for any person or persons to bring, drive or transport any cattle into any county of the state of Kansas, except for immediate slaughter, ³⁹⁹ as provided in the preceding section, from any point south of the south line of Kansas, without having first caused such animal or animals to be inspected and passed under certificate of health by the livestock sanitary commissioner of this state, or some inspector thereof, duly authorized by such commis-

sioner, or by the bureau of animal industry of the interior department of the United States government; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both such fine and imprisonment."

It is said the law is void because it prohibits bringing cattle into the state from below its south line at all seasons of the year, and whether they are diseased or not, unless inspected, and that the stock owner is placed at the mercy of the livestock sanitary commissioner, who has the power to admit or exclude cattle as he may see fit. It is true that all cattle coming from the south must be inspected at all seasons of the year, but capricious conduct on the part of the livestock sanitary commissioner is not contemplated. He has no discretion. He merely ascertains facts. If incoming cattle are healthy, he passes them. If they are diseased, he turns them back. Inefficiency or abuse of power in the administration of quarantine laws cannot be presumed. Inspectors are to be credited with proper capacity and proper motives until a case to the contrary is presented. Such an instance, if one should arise, would disclose conduct outside the purview of the offending individual's legal authority and could not be charged to the law itself. All human laws must be executed by fallible men, but such laws are not on that account unrighteous.

The only question, then, is, if the statute imposes an unreasonable restriction upon interstate commerce, the territory lying south of the south line of Kansas from which cattle may be brought into the state virtually ⁴⁰⁰ being treated as an infected district. The prevalence of *Boophilus bovis*, or Southern ticks, in the cattle country south of Kansas is a fact of common knowledge. The courts take judicial notice of it: *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653, 28 S. W. 756, 26 L. R. A. 638. Recent scientific investigation shows that animals coming from portions of that region, at least, are always likely to be capable of communicating what is known as Texas, splenetic, or Spanish, fever. The liability of infection from animals coming from other parts is so great that it cannot be said the regulation

is unnecessary to guard properly against the danger to be apprehended.

There is so great a dissimilarity between this statute and the one under consideration in the case of *State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 51 Pac. 456, 39 L. R. A. 365, that the decision there made is not an authority. The prohibition upon importation is not absolute here, as in the case of *Hannibal etc. R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527. The discrimination between sections is based upon known conditions warranting it. The detention of cattle for inspection is not unduly burdensome. The cost of inspection is borne by the state itself. Cattle free from disease are passed under a certificate of health. Hence the statute is sustainable under the well-recognized power of the state to protect its livestock by reasonable inspection laws against the ravages of contagious and infectious diseases.

Some confusion between different provisions of the law relating to the general subject of livestock sanitation and inspection is pointed out, but the section quoted above is not affected, and is sufficient to uphold the judgment of the district court.

Some minor questions are discussed, A reading of rule 13 of the Interior Department of the United States shows that it could not have contributed to the verdict rendered without connecting evidence not found in the record. Hence the error in admitting it was harmless. ⁴⁰¹ The proof of every element of the offense charged was ample. The reference by the county attorney to the absence from the case of a certificate of inspection was not a reference to the failure of the defendant to testify. The instructions given are not printed in the brief, as required by rule 10, and from what has been said it is apparent the instructions refused were rightfully refused.

The judgment of the district court is affirmed.

All the justices concurring.

The Foregoing Decision, when taken on writ of error to the supreme court of the United States, was affirmed (*Asbell v. Kansas*, 28 Sup. Ct. Rep. 285) in an opinion by Mr. Justice Moody, as follows:

“A statute of the state of Kansas makes it a misdemeanor, punishable by fine or imprisonment, or both, for any person to transport into the state cattle from any point south of the south line of the state, except for immediate slaughter, without having first caused them to

be inspected and passed as healthy by the proper state officials or by the bureau of animal industry of the interior department of the United States: Sess. Laws 1905, c. 495, sec. 27. The plaintiff in error was duly charged by information in the state court with a violation of this statute, and found guilty by the verdict of a jury. The conviction was affirmed by the supreme court of the state, and the case is now here on a writ of error, allowed by the chief justice of that court. The only federal question insisted upon in argument is whether the statute was a restriction of interstate commerce which was not within the power of a state to impose.

“The obvious purpose of the law was to guard against the introduction into the state of cattle infected with a communicable disease. It undoubtedly restricts the absolute freedom of interstate commerce in cattle, but only to the extent that all cattle coming to cross the guarded boundary are subjected to inspection to ascertain whether or not they are diseased. If healthy they are admitted; if diseased they are excluded. The validity of such a restriction for such purposes has been frequently considered by this court, and the principles applicable to the settlement of the question have been clearly defined. The governmental power over the commerce which is interstate is vested exclusively in the Congress by the commerce clause of the constitution, and therefore is withdrawn from the states. It is not now necessary to cite the many cases supporting this proposition, or to consider some expressions in the books somewhat qualifying its generality, because in carefully chosen words it has recently been affirmed by us. At this term, Mr. Justice Peckham, speaking for the court, said: ‘That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the constitution is obvious’: *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. Rep. 121.

“But, though it may not legislate for the direct control of interstate commerce, the state may exercise any part of the legislative power which was not withdrawn from it expressly or by implication by the scheme of government put into operation by the federal constitution. It may sometimes happen that a law passed in pursuance of the acknowledged power of the state will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate interstate commerce, may reach and indirectly control that subject. It was at an early day observed by Chief Justice Marshall that legislation referable to entirely different legislative powers might affect the same subject. He said in *Gibbons v. Ogden*, 9 Wheat. 194, 6 L. ed. 68:

“ ‘So, if a state, in passing laws on subjects acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt,

it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

“ ‘In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.’

“ ‘Foreseeing cases where national and state legislation based upon different powers might, in their application, be brought into conflict, he, in the same case, declared that then ‘the law of the state, though enacted in the exercise of powers not controverted, must yield’—a rule which has constantly been applied by this court. These general principles control the decision of the case at bar. Cattle, while in the course of transportation from one state to another, and in that respect under the exclusive control of the law of the national government, may, at the same time, be the conveyance by which disease is brought within the state to which they are destined, and in that respect subject to the power of the state, exercised in good faith to protect the health of its own animals and its own people. In the execution of that power the state may enact laws for the inspection of animals coming from other states with the purpose of excluding those which are diseased and admitting those which are healthy: *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. Rep. 92, 47 L. ed. 108.

“ ‘The state may not, however, for this purpose, exclude all animals, whether diseased or not, coming from other states (*Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527), nor, under the pretense of protecting the public health, employ inspection laws to exclude from its borders the products or merchandise of other states; and this court will assume the duty of determining for itself whether the statute before it is a genuine exercise of an acknowledged state power, or whether, on the other hand, under the guise of an inspection law, it is really and substantially a regulation of foreign or interstate commerce which the constitution has conferred exclusively upon the Congress: *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Brimmer v. Rebman*, 138

U. S. 78, 11 Sup. Ct. Rep. 213, 34 L. ed. 862, 3 Inters. Com. Rep. 485; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 18 Sup. Ct. Rep. 862, 43 L. ed. 191. Tested by these principles, the statute before us is an inspection law and nothing else; it excludes only cattle found to be diseased; and, in the absence of controlling legislation by Congress, it is clearly within the authority of the state, even though it may have an incidental and indirect effect upon commerce between the states. The cause, however, cannot be disposed of without inquiring whether there was, at the time of the offense, any legislation of Congress conflicting with the state law. If such legislation were in existence, the state law, so far as it affected interstate commerce, would be compelled to yield to its superior authority. This question was considered and the national legislation carefully examined in *Reid v. Colorado*, supra, and the conclusion reached that Congress had not then taken any action which had the effect of destroying the right of the state to act on the subject. It was there said (page 148): 'It did not undertake to invest any officer or agent of the Department with authority to go into a state, and, without its assent, take charge of the work of suppressing or extirpating contagious, infectious, or communicable diseases there prevailing, and which endangered the health of domestic animals. Nor did Congress give the Department authority, by its officers or agents, to inspect cattle within the limits of a state and give a certificate that should be of superior authority in that or other states, or which should entitle the owner to carry his cattle into or through another state without reference to the reasonable and valid regulations which the latter state may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.' There has, however, been later national legislation which needs to be noticed. Large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretary of Agriculture by the act of February 2, 1903 (32 Stats. at Large, 791, c. 349; U. S. Comp. Stats. Supp. 1907, p. 923), and the act of March 3, 1905 (33 Stats. at Large, 1264, c. 1496; U. S. Comp. Stats. Supp. 1907, p. 925). The provisions of these acts need not be fully stated. The only part of them which seems relevant to this case and the question under consideration which arises in it is contained in the law of 1903. In that law it is enacted that when an inspector of the bureau of animal industry has issued a certificate that he has inspected cattle or livestock and found them free from infectious, contagious, or communicable disease, 'such animals so inspected and certified may be shipped, driven, or transported . . . into . . . any state or territory . . . without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.' There can be

no doubt that this is the supreme law, and, if the state law conflicts with it, the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the bureau of animal industry of the United States, thus avoiding a conflict with the national law. Rule 18, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined states, which is not this case, and that in terms it recognizes restrictions imposed by the state of destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none.

“Judgment affirmed.”

MERTZ v. HUBBARD.

[75 Kan. 1, 88 Pac. 529.]

STATUTE OF FRAUDS.—The Memorandum Required to Satisfy the Statute of Frauds must give the name of the contracting parties or some description by which they can be identified. (p. 353.)

STATUTE OF FRAUDS—Necessity of Showing for Whom an Agent Acted in Making a Contract Relating to Real Property.—If a contract for the sale of real property shows that one of the parties subscribing it acted as agent for some undisclosed principal, it cannot be enforced against the latter where his relation to it must be established, if at all, by parol evidence. (pp. 355, 356.)

B. H. Tracy and Cadding & Keyser, for the plaintiff in error.

Wheeler & Switzer, for the defendant in error.

■ **MASON, J.** A real estate broker wrote to the owner of a tract of land saying that he had a customer for it, and asking its price. Correspondence followed which for present purposes may be said to have resulted in a contract in writing for the sale of the land, valid in every respect unless it was rendered nonenforceable under the statute of frauds by this fact: while it showed that the agent was acting for another and was not himself bound, it nowhere disclosed the identity of his principal. The owner refused to convey, and the would-be purchaser in whose behalf the negotiations had been conducted brought a suit to compel

him to do so. The petition set out the correspondence in full, and thereby invited the question whether the requirements of the statute had been met, which the defendant raised by demurring. The demurrer was sustained, and the plaintiff prosecutes error.

As indicated, the inquiry to be determined is this: Where a written agreement for the sale of land shows that one of the two persons by whom it is made incurs no individual liability, but acts merely as the agent of some one who is not named or described, can specific performance thereof be compelled at the suit of the undisclosed principal, whose relation to the transaction can be proved only by parol evidence, where the statute of frauds requires such contracts to be in writing?

It is settled law that a memorandum, in order to meet the requirements of the statute of frauds, shall give the names of the contracting parties or some description by which they can be identified: 29 Am. & Eng. Ency. of Law, 864. Several courts have held that this rule is not satisfied by the memorandum's naming an agent who acts for one of the parties throughout the transaction but who is not personally bound. The leading case to this effect is *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366, which has been followed in *Oglesby G. Co. v. Williams Mfg. Co.*, 112 Ga. 359, 37 S. E. 372; *Clampet v. Bells*, 39 Minn. 272, 39 N. W. 495; *Mentz v. Newwitter*, 122 N. Y. 491, 19 Am. St. Rep. 514, 25 N. E. 1044, 11 L. R. A. 97; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179. To the same effect are *Schenck v. Spring Lake Beach Improvement Co.*, 47 N. J. Eq. 44, 19 Atl. 881; *O'Sullivan v. Overton*, 56 Conn. 102, 14 Atl. 400; *Knox v. King*, 36 Ala. 367; *Sherburne v. Shaw*, 1 N. H. 157, 8 Am. Dec. 47, and *Wheeler v. Walden*, 17 Neb. 122, 22 N. W. 346.

The plaintiff in error concedes that these cases are against his contention, but maintains that another line of decisions declare the contrary doctrine, and that this court is practically committed to it. He chiefly relies upon *Walsh v. Barton*, 24 Ohio St. 28, which is directly in point and goes to the full length claimed, its precise scope being indicated by this extract from the opinion: "This writing, by fair construction, shows that the auctioneers therein named acted, in and about the making of the sale, as the agents of the vendors The only question, therefore, is whether it be necessary, in order to satisfy the statute of frauds, that

the names of the principals should appear in the memorandum, in a case where the contract was, in fact, made by their agents, and the names of the agents are set out in the writing. We think the statute is satisfied in this respect when the names of the agents are set out in writing, though the names of their principals be not disclosed. The case being thus taken out of the statute, the right or liability of the principals may be enforced, and their identity established, according to the rules of law governing in other cases, where contracts are made by agents without disclosing their principals: *White v. Proctor*, 4 Taunt. 209; *Hood v. Lord Barrington*, L. R. 6 Eq. 218; *Lerned v. Johns*, 91 Mass. 419; *Eastern R. R. Co. v. Benedict*, 5 Gray, 561, 66 Am. Dec. 384; *Gowen v. Klous*, 101 Mass. 449; *Higgins v. Senior*, 8 Mees. & W. 834; *Thayer v. Luce*, 22 Ohio St. 62."

The language quoted embraces all that is there said by way of argument. Of the English cases cited, only *Hood v. Lord Barrington*, L. R. 6 Eq. 218, which ⁴ appears to have been decided without much discussion, reaches the proposition stated. The case of *Thayer v. Luce*, 22 Ohio St. 62, and the earliest Massachusetts case, *Lerned v. Johns*, 91 Mass. 419, turn upon an entirely different state of facts. In each of them the memorandum contained no reference to any agency, but showed an agreement between two parties, each of whom was personally bound by it, and all that was decided was that under such circumstances parol evidence might be adduced that one of the parties named was in fact acting for a third person, who upon such showing would be entitled to all the benefits of the contract and subject to all its burdens. The effect of the other Massachusetts cases cited is perhaps not important in view of later decisions. In *McGovern v. Hern*, 153 Mass. 308, 25 Am. St. Rep. 632, 26 N. E. 861, 10 L. R. A. 815, the naming of an auctioneer was held not to be a sufficient designation of the seller, and *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366, was cited with approval. But in *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340, which is probably the latest expression on the subject in the Massachusetts reports, it was said that it is sufficient if the memorandum gives the name of the agent by whom one party is represented, although the fact of his agency is shown, and *McGovern v. Hern*, 153 Mass. 308, 25 Am. St. Rep. 632, 26 N. E. 861, 10 L. R. A. 815, is explained and distinguished on the ground that there the auctioneer

was not in fact the agent of the seller, but was merely the person who conducted the formal part of the sale.

While occasional expressions are to be found elsewhere favoring what may be characterized as the view of the Ohio and Massachusetts courts, our attention has not been called to any case other than those already mentioned which expressly upholds it. The weight of authority clearly supports the view taken by the trial court. Moreover, whatever conflict exists appears to have resulted from confusing the case of an undisclosed agency with that of an avowed agency, the principal being undisclosed. In reason there should be no difficulty ⁵ in reaching a satisfactory solution of the question. Where a written agreement for the sale of lands is entered into by two competent persons, each apparently acting for himself, the requirements of the statute of frauds are fully met and the result is a valid and enforceable contract. Being then complete, it has no further concern with the statute. It is like any ordinary written contract. Parol evidence cannot vary its terms, but may add a new obligor or obligee by showing that one or the other of the parties was in fact acting as the authorized agent of a third person. The authorities are practically unanimous on this proposition. (They are collected in 1 Am. & Eng. Ency. of Law, 1140, note 1, 1 Am. & Eng. Ency. of Law (Supp.), 216, note 1, 29 Am. & Eng. Ency. of Law, 864, note 3, and in *Usher v. Daniels*, 73 N. H. 206, 60 Atl. 746, 69 L. R. A. 629.) But when the writing discloses that one of the persons is avowedly acting as an agent for some one else, who is not named or described, an entirely different situation is presented. An imperative requirement of the statute is that the memorandum must indicate the parties: 29 Am. & Eng. Ency. of Law, 864. This requirement is not met by the naming of an agent who confessedly acts only as such. Not being personally concerned in the matter, assuming no individual liability, he is not a party to the agreement. The mention of his name is therefore immaterial, and fails to satisfy the statute. The memorandum being for this reason futile, no enforceable contract results. The rule that undisclosed principals may, by parol evidence, be charged with the burdens of a written contract or be given its benefits has no room for operation in such a case, because there is no valid written contract to start with to which to apply it. Such is the condition presented by the petition here involved,

and for that reason the defendant's demurrer was properly sustained.

Nothing in the Kansas decisions cited by the plaintiff in error conflicts with this conclusion. The case of *Butler v. Kaulback*, 8 Kan. 668, has no application to ⁶ the question here involved, for there the contract was taken out of the statute by part performance. The case of *Wolfley v. Rising*, 12 Kan. 535, does not mention the statute of frauds, and all it decided was that parol evidence is admissible to show that an apparent principal in a written contract is in fact an agent and to reveal and charge the real party in interest. In *Ross v. Allen*, 45 Kan. 231, 25 Pac. 570, 10 L. R. A. 835, the memorandum was held insufficient on various grounds, and *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366, was cited with approval. In passing it was said that if its only defect had been the failure to show for whom an agent acted the fault could probably have been remedied by parol testimony. But the remark obviously was not meant to be regarded as decisive of the question.

The judgment is affirmed.

A Memorandum of Sale cannot satisfy the statute of frauds, unless it either names the vendors or describes them so that they can be identified by other evidence: *McGovern v. Hern*, 153 Mass. 308, 25 Am. St. Rep. 632; *Mentz v. Newwitter*, 122 N. Y. 491, 19 Am. St. Rep. 514. However, the Christian name of the vendee need not appear in the memorandum, as where he is designated as "Mr. Lee": *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800.

SCHNEIDER v. ANDERSON.

[75 Kan. 11, 88 Pac. 525.]

STATUTE OF FRAUDS—Memorandum may be in Several Instruments.—The statute of frauds does not require that the contract shall consist of a single instrument. Several distinct and separate writings may be considered together as containing all the terms of a contract, though one only of them is signed by the party to be charged. (pp. 358, 359.)

STATUTE OF FRAUDS—Helping Out Memorandum by an Undelivered Conveyance.—If a contract for the sale and purchase of real property is not of itself sufficient, but at the time it was executed the vendor also executed a conveyance of the property pursuant to the sale, to be delivered to the grantee on his compliance with the conditions of the sale, such memorandum and conveyance may be considered and construed together, and if from both the contract suf-

ficiently appears, specific performance thereof will be decreed. (pp. 361, 362.)

STATUTE OF FRAUDS—Failure of One of the Parties to Sign Memorandum.—The failure of one of the parties to sign the contract or memorandum cannot be pleaded as a defense by the other who did sign it. The filing of the bill for specific performance constitutes an acceptance by the complainant. (p. 362.)

T. A. Kramer, for the plaintiff in error.

Mooney & Stratford, for the defendant in error.

¹² PORTER, J. The trial court sustained a general demurrer to plaintiff's petition in a suit for the specific performance of a contract for the purchase and sale of real estate. Plaintiff stood upon the petition and brings error.

The only question is whether the petition states a cause of action. The pleading is very lengthy, but in substance it alleged that Charles O. Anderson, an unmarried man, was the owner of a farm in Butler county, subject to certain encumbrances, and on August 24, 1904, a contract was entered into between them, by which defendant agreed to sell the farm to plaintiff for two thousand one hundred dollars; that plaintiff was to have one-half of the corn in the field and defendant the other half; that the purchase price was to be paid to W. E. Brown, who was to pay off all the encumbrances on the land from the proceeds, and pay the balance, if any, to defendant; that the following memorandum in writing was drawn up and signed by the parties at the time the contract was made:

“Augusta, Kan.....190.....

“Anderson to receive 2100 of Schneider. Anderson to have ½ corn, Schneider other half in field. Anderson to leave everything on farm, and to give possession October 1/04.

CHARLES O. ANDERSON,

“GEORGE SCHNEIDER.”

It is alleged that George Schneider was the duly authorized agent of Katie Schneider and signed the memorandum for her, and that his appointment was not in writing. The petition further alleged that at the same time, as a part of the agreement and for the purpose of carrying out the same, Anderson executed ¹³ a warranty deed conveying the real estate to plaintiff, which was duly acknowledged before a notary public and was then and there deposited by the parties with W. E. Brown, who was to deliver the same to

plaintiff upon receipt of the two thousand one hundred dollars. These, it is alleged, were the only writings executed by the parties in reference to the transaction. Copies of the memorandum and the deed were attached to and made a part of the petition.

The petition alleged that about September 6, 1904, defendant notified plaintiff that he would not carry out the terms of the contract, and other facts were pleaded to the effect that on September 9, 1904, defendant had placed an encumbrance on the land in favor of his mother, which it was averred was without consideration and for the purpose of defrauding the plaintiff. Other facts with reference to other encumbrances were set forth but are not important in the present consideration. It was alleged that defendant had appropriated to his own use the entire crop of corn, in violation of the agreement. Plaintiff averred full performance of all the conditions on her part, a tender of the entire sum of two thousand one hundred dollars to W. E. Brown, and a demand for the delivery of the deed. The relief prayed for was the specific performance of the contract, damages for the value of the part of the corn crop which plaintiff claimed, and the marshaling of the proceeds of the sale so as to protect her title from encumbrances beyond the amount stated in the contract.

The question, therefore, is whether the averments of the petition show an agreement or a note or memorandum thereof in writing, signed by Anderson, for the sale and conveyance of the lands. Our statute of frauds at the time this transaction occurred provided: "No action shall be brought . . . upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, ¹⁴ or some other person thereunto by him or her lawfully authorized": Gen. Stats. 1901, sec. 3174.

The statute has since been amended by adding the words "in writing" after the word "authorized": Laws 1905, c. 266, sec. 1. The object of the statute is to protect persons from being imposed upon by parol agreements against their consent; to require written evidence of the substance of the contract, signed by the party to be charged. These purposes are satisfied whenever there exists a written statement

signed by the party containing either expressly or by necessary inference all the terms of the agreement, the names of the parties, the subject matter of the contract, the consideration, and the promise, so that nothing remains open to future negotiation.

The memorandum itself, it is contended, is not sufficient to satisfy the requirements of the statute. It recites that Anderson is to receive of Schneider two thousand one hundred dollars and is to reserve one-half of the corn field, is to leave everything on the farm, and give possession October 1st. What the two thousand one hundred dollars is for is not shown with sufficient definiteness, and the land itself is not sufficiently described. In *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536, a description of the land as the "Snow farm" was held sufficient. But the ambiguity vanishes and all uncertainty disappears when, in connection with the memorandum, we look at the deed conveying the land to the plaintiff executed by Anderson at the same time and as a part of the same transaction. The two thousand one hundred dollars appears at once to be the consideration for the sale of the farm, and there is no longer any uncertainty what farm he is to leave everything on and give possession of October 1st.

The statute does not require that the contract shall consist of a single instrument. "Several distinct and separate writings may be construed together as containing all the terms of the contract, though only one of them be signed by the party to be charged": 29 Am. & Eng. Ency. of Law, 850, 851, and cases cited. See, also, ¹⁵ Pomeroy on Contracts, 2d ed., secs. 84, 85, 91. If from all of them the definite terms of a contract can be gathered, it may be enforced notwithstanding the statute, provided the several writings relate to and are connected with the subject matter of the contract so that they can fairly be said to constitute one transaction: *Ryan v. United States*, 136 U. S. 68, 10 Sup. Ct. Rep. 913, 34 L. ed. 447; *Charlton v. Columbia Real Estate Co.*, 67 N. J. Eq. 629, 110 Am. St. Rep. 495, 60 Atl. 192, 69 L. R. A. 394; *Johnson & Miller v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. 41; *Kopp v. Reiter*, 146 Ill. 437, 37 Am. St. Rep. 156, 34 N. E. 942, 22 L. R. A. 273. See, also, *Morrow v. Moore*, 98 Me. 373, 99 Am. St. Rep. 410, 57 Atl. 81; *Brown v. Brown*, 33 N. J. Eq. 650.

In *Charlton v. Columbia Real Estate Co.*, 67 N. J. Eq. 629, 110 Am. St. Rep. 495, 60 Atl. 192, 69 L. R. A. 394, a duplicate lease of lands had been signed by defendant but not delivered. The memorandum of the contract was insufficient by itself. It was held error to refuse to admit the lease in evidence, and the cause was reversed. The court said: "If all the papers, taken together, contain the whole bargain, they form such a memorandum as will satisfy the statute."

In *Ryan v. United States*, 136 U. S. 68, 10 Sup. Ct. Rep. 913, 34 L. ed. 447, the exact question was decided. There was a written proposal by defendant to sell, and a written acceptance by the vendee. The writings, however, were themselves insufficient to take the case out of the Michigan statute of frauds, because there was lacking a description of the land. The vendor had executed and delivered a deed to the officer of the government for examination, the United States being the vendee. Mr. Justice Harlan, speaking for the court, said: "Whatever may be said as to the effect of this deed in passing title, if it was delivered only for purposes of examination, or if the previous memorandum of sale had been for any reason fatally defective under the statute of frauds, its recitals, coming as they do from the vendor, are competent for the purpose of showing ¹⁶ the precise locality of the property which the memorandum of sale was intended to embrace."

The case of *Jenkins v. Harrison*, 66 Ala. 345, is cited with approval. To the same effect see *Leonard v. Woodruff*, 23 Utah, 494, 65 Pac. 199. In *Thayer v. Luce*, 22 Ohio St. 62, it was said: "In this case, upon inspection and comparison of the memorandum and the deed, although no reference is made in either to the other, we find with reasonable certainty that they do relate to the same transaction, and contain fully the terms of a contract of bargain and sale between the parties."

In *Strouse v. Elting*, 110 Ala. 132, 20 South. 123, it was held that where, upon mere inspection of the separate writings, an implication of their connection arises, parol evidence may be admitted to show the connection.

Both the writings here are signed by the party to be charged; they were executed at the same time and as part of the same transaction. Inspection alone shows their connection; and, taken together, we think they are sufficient to satisfy the statute. The memorandum and deed together show the parties, the subject matter, the promises upon both sides, the price and consideration. These are all that are required:

Pomeroy on Contracts, 2d ed., sec. 87; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Brundige v. Blair, 43 Kan. 364, 23 Pac. 482; Miller v. Kansas City etc. R. R. Co., 58 Kan. 189, 48 Pac. 853; Newton v. Lyon, 62 Kan. 306, 62 Pac. 1000.

The courts are at variance upon the question whether a deed alone, when executed by the vendor and deposited in escrow, to be delivered by the depositary to the grantee upon his paying the purchase price or performing some other condition, is in itself a sufficient memorandum to avoid the statute of frauds. (The cases are cited in 29 Am. & Eng. Ency. of Law, 855.) A majority say that the deed alone is not a sufficient memorandum. But the better reasoning seems to be the other way. The ground usually stated for holding that¹⁷ the deed is not a sufficient memorandum is that, until it is finally delivered or the condition is performed, it does not constitute a contract. The reason given seems to be beside the question, which, in this character of cases, is not, Was there a written contract? but is, Is there a sufficient memorandum signed by the party which is evidence that a contract existed or which tends to prove that fact? The evil the statute seeks to guard against is the use of oral evidence to prove a contract. This is obviated by the production of the deed which is a memorandum of a contract. In Miller v. Kansas City etc. R. R. Co., 58 Kan. 189, 48 Pac. 853, the case of Warfield v. Wisconsin Cranberry Co., 63 Iowa, 312, 19 N. W. 224, was quoted as follows: "The statute was not intended to apply to written [contracts], but to the enforcement of oral contracts, when properly evidenced, as by the admission in writing of the party to be charged."

By far the best reasoned case we have examined is Jenkins v. Harrison, 66 Ala. 345, followed in Johnston v. Jones, 85 Ala. 286, 4 South. 748. It is said in the former case: "A deed, drawn and executed with the knowledge of both parties, with a view to the consummation of the contract of sale, which, in itself and of itself, embodies the substance, though not all the details or particulars of the contract, naming the parties, expressing the consideration, and describing the lands, though not delivered, and its delivery postponed until the happening of a future event, is a note or memorandum of the contract sufficient to satisfy the words, the spirit, and purposes of the statute of frauds."

However, in the case at bar, we are not compelled to look to the deed alone; and, as before observed, we think the memo-

randum, together with the deed, amply sufficient to satisfy the statute. The demurrer to the petition should have been overruled.

The claim is made by defendant that there was no mutuality in the alleged contract because it was ¹⁸ signed by him alone. The want of mutuality arising from the failure of both parties to sign cannot be successfully pleaded as a defense by the party who did sign: *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. 164, and the same case in 49 Kan. 416, 30 Pac. 459. The filing of a suit for specific performance constitutes an acceptance and binds the plaintiff: *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97; *Ullsperger v. Meyer*, 217 Ill. 262, 75 N. E. 482, 2 L. R. A., N. S., 221.

The judgment is reversed and the cause remanded, with directions to overrule the demurrer.

A Writing to Satisfy the Statute of Frauds must be signed by the party to be charged, but it need be signed only by him. And several papers, though each in itself is insufficient to constitute a memorandum, may be considered and used together to make up a complete memorandum: *Charlton v. Columbia Real Estate Co.*, 67 N. J. Eq. 629, 110 Am. St. Rep. 495, and cases cited in the cross-reference note thereto. As to what effect and consideration can be given to an undelivered writing for this purpose, see *Charlton v. Columbia Real Estate Co.*, 67 N. J. Eq. 629, 110 Am. St. Rep. 495; *Morrow v. Moore*, 98 Me. 373, 99 Am. St. Rep. 410; *Kapp v. Reiter*, 146 Ill. 437, 37 Am. St. Rep. 156, and cases cited in the cross-reference note thereto.

NEW YORK LIFE INSURANCE COMPANY v. MARTINDALE.

[75 Kan. 142, 88 Pac. 559.]

NEGOTIABLE INSTRUMENTS—Holding an Undisclosed Agent.—If a negotiable instrument has nothing on its face to connect the payee with the person for whom he was an agent or for whose benefit it was given, the latter cannot be held liable under an indorsement thereof made by the person named as payee. (pp. 363, 364.)

JURY TRIAL—Omission to Instruct the Jury as to a Matter of Common Knowledge.—The refusal of the court to instruct the jury that the rate of interest by virtue of the statute is six per cent per annum cannot be excused and a reversal avoided, on the ground that such instruction was unnecessary, as it merely stated what is a matter of common knowledge. (p. 365.)

PROMISSORY NOTE—Fraudulent Alteration, Failure to Instruct as to Legal Interest.—Where the maker of a note sued thereon defends on the ground that it has been fraudulently altered since its

execution by inserting therein a provision making it bear interest at the rate of five per cent per annum, it is reversible error to refuse to instruct the jury that if the note as executed contained no specification of the rate of interest, it would bear interest at the rate of six per cent, though if the note was really fraudulently altered after its execution, it is not material whether, as altered, it is more or less onerous to the obligor. (p. 365.)

PROMISSORY NOTE, Unauthorized Alteration Thereof Lowering the Rate of Interest.—A note may be vitiated by an unauthorized alteration made by lowering the rate of interest. Whether the contract, after its alteration, is better or worse for the obligor is not material, if he did not assent to its alteration. (p. 365.)

Kellogg & Madden, for the plaintiff in error and defendant in error S. A. Stotler.

R. H. Hamer, for the defendant and cross-petitioner in error, Howard Martindale.

¹⁴³ MASON, J. S. A. Stotler applied for a policy in the New York Life Insurance Company, and for the first premium gave his negotiable note, payable to Herman Fist, the company's agent. The note did not show the purpose for which it was given or disclose that Fist was acting otherwise than in his personal capacity. Fist sold and indorsed the note to Howard Martindale, who after its maturity brought an action upon it against Stotler, also seeking to charge the insurance company, which he made a defendant, upon the ground that as the note was taken and sold in the course of the company's business Fist's indorsement bound the company. Upon a jury trial the plaintiff was given a judgment against the insurance company, but was denied relief against Stotler. The insurance company now seeks to reverse the judgment rendered against it, and Martindale asks that he be granted a new trial of his case against Stotler. Both claims of error must be sustained.

¹⁴⁴ The insurance company cannot be held, for the reason that upon the face of the note there was nothing to connect it with the transaction or to suggest that Fist was acting as an agent. Although it is familiar law that ordinarily where an agent while acting as such executes in his own name a written contract which does not reveal the fact of his agency parol evidence is admissible to charge the undisclosed principal, it is equally well settled that an exception to this rule is made in the case of negotiable instruments.

“Where a person is not a party to a negotiable note or bill of exchange, he cannot be charged upon proof that the osten-

sible party signed or indorsed as his agent, since persons dealing with negotiable contracts are presumed to take them on the credit of the parties whose names appear upon them": 1 Am. & Eng. Ency. of Law, 1141.

Many authorities upon this proposition are collected in a note to the text quoted, and in an additional note printed in the first volume of the supplement to the work cited, at page 216. A number of them apply the same rule even where the maker adds to his signature the word "agent," or some similar expression. Of the cases mentioned as supporting a contrary doctrine, several, as there indicated, were affected by the circumstance that the principal and agent were husband and wife; the cases of *Mechanics' Bank v. Bank of Columbia*, 18 U. S. 326, 5 L. ed. 100, and *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366, turned upon the fact that the instruments there involved bore upon their face something from which an agency might be inferred; the case of *Sharpe v. Bellis*, 61 Pa. 69, 100 Am. Dec. 618, involved special complications; as stated in the later note the soundness of *Sessums v. Henry*, 38 Tex. 37, was challenged in *McGregor v. Hudson* (Tex. Civ. App.), 30 S. W. 489; and the court in *Harper v. Tiffin Nat. Bank*, 54 Ohio St. 425, 44 N. E. 97, professed to found the liability of the undisclosed principal, not upon the note, but upon the special facts of the case, of which the making of the note was¹⁴⁵ but a part. It is therefore manifest that so far as relates to the question here presented the opposition to the current of authority is not strong enough to warrant treating it as open. Moreover, in *Kansas Nat. Bank v. Bay*, 62 Kan. 692, 84 Am. St. Rep. 417, 64 Pac. 596, 54 L. R. A. 408, this court has already applied the principle stated: See, also, 7 Cyc. 549; 20 L. R. A. 707, note; *Webster v. Wray*, 19 Neb. 558, 56 Am. Rep. 754, 27 N. W. 644.

As between *Martindale* and *Stotler*, the principal issue arose upon an allegation of an alteration in the note. *Stotler* testified that when it was presented to him for signature it bore the words "with interest at the rate of ten per cent per annum"; that he then refused to pay interest and the word "ten" was erased, the space being left blank, whereupon he signed it; that afterward, without his knowledge or consent, the clause quoted was altered so as to read "with interest at the rate of five per cent per annum from maturity." Testimony that the change was made before execution was introduced by *Martindale*, who asked the court to instruct the jury

that a note in which no rate of interest is expressed draws interest after maturity in virtue of the statute at the rate of six per cent per annum. The request was refused, and the refusal is assigned as error.

Upon this branch of the case defendant in error Stotler argues that such instruction was unnecessary, inasmuch as it merely stated what is a matter of common knowledge, with which the jury must be presumed to have been familiar. This consideration does not serve to excuse the omission to give the charge requested. The issue of fact was clear, the conflict of testimony direct. The jury were required to determine whether the figure "5" was inserted in the note before or after its execution. Surely nothing could be of greater importance in enabling them to arrive at a just conclusion than that they should understand the difference in the legal effect of the instrument dependent ¹⁴⁶ upon the presence or absence of the figure "5"—that they should have authoritative information that the note as pleaded by the plaintiff bore interest at a lower rate than Stotler says it did when he signed it. Assuming that the jury entered the box with correct views on the subject, we cannot be sure that when they found the maker resisting payment of the note on the ground that it had been fraudulently altered by a lowering of the rate of interest their confidence in their judgment may not have been shaken. Under such circumstances they may have reasoned that the alleged change must have been against the maker rather than in his favor, and inferred that it originally bore no interest even after maturity, especially as in his answer he had pleaded that the note expressly stated that it should bear none. For the failure to cover this matter by a proper instruction the judgment in favor of Stotler also must be reversed.

It seems to be conceded that a note may be vitiated by an unauthorized alteration made by lowering the rate of interest, and properly so, for the contract shown by the paper as changed would be different from that entered into by the parties, and whether a better or worse one for the obligor is not material: 2 Am. & Eng. Ency. of Law, 186, 225; 2 Cyc. 196, 197, note 85.

Martindale also assigns as error the refusal to give an instruction requested in his behalf to the effect that because the law presumes that men act honestly there was a presumption that the note was not changed after its execution. The complaint is groundless, for the court told the jury that the bur-

den of proof was upon Stotler to show that the alteration was made after delivery.

The judgment is reversed and the cause remanded for further proceedings in accordance herewith.

Johnston, C. J., Greene, Burch, Smith, Porter, JJ, concurring.

Graves, J., not sitting, having been of counsel.

If an Agent Signs a Note with His Own Name alone, and there is nothing on its face to show that he is acting as agent, he is, and his principal is not, personally liable on the note: *Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. Rep. 343, and see the cases cited in the cross-reference note thereto.

The Alteration of the Interest Clause in a written obligation is a material alteration: See the note to *Burgess v. Blake*, 86 Am. St. Rep. 96, on the unauthorized alteration of written instruments.

WILSON v. CAMPBELL.

[75 Kan. 159, 88 Pac. 548.]

PLEADING, Amendment of in Cases of Unlawful or Forcible Entry and Detainer.—A complaint alleging an unlawful entry and forcible detainer of premises may be amended so as to charge an unlawful and forcible entry. (p. 367.)

FORCIBLE ENTRY not Justified by Ownership and Right of Possession.—If an owner entitled to the possession can lawfully obtain it, he may enter and hold it, but he has not the right to resort to unlawful and forcible means to gain possession. (p. 368.)

FORCIBLE ENTRY, Force Sufficient to Sustain Proceeding for. If an occupant of property leaves it with the building located thereon, and in his absence a party of men acting for another invade the premises, detach and carry away the furniture and fixtures, load them on a car, and carry them away and place them in a warehouse, this is sufficient evidence of a forcible entry. (p. 368.)

Ferry & Doran, for the plaintiff in error.

W. F. Schoch and Lee Monroe, for the defendant in error.

159 JOHNSTON, C. J. This was an action of unlawful and forcible entry and detainer. F. A. Campbell leased a hotel or residence building, a refectory and pagodas in Vinewood Park from E. W. Wilson for the park season of 1904, beginning about April 15th and ending about November 15th, with the option of continuing the contract for the season of 1905 if

the conduct of the business should prove satisfactory to Wilson. Under the lease Campbell furnished and equipped the hotel and other buildings and conducted the business during ¹⁶⁰ the season of 1904, and then left the buildings so furnished and equipped in the care of his agent, Shick, who lived in the hotel and guarded the property. Near the end of the season a general notice to terminate the lease was given by Wilson to Campbell, but there was no statement that his conduct of the business was unsatisfactory nor any reason given why he should not have the benefit of the option to continue for another year. He remained in possession of the buildings until Sunday, March 12, 1905, when a number of men acting for Wilson invaded the premises in the absence of Campbell and Shick, his agent, detached and carried out his furniture and fixtures, loaded them on a car and brought them to the city, where they were placed in a warehouse.

The doors were locked when Shick left the buildings on that day, and when he returned he found that the doors had been unlocked, the carpets taken up and the furniture and fixtures removed, some of which had been already loaded upon a car and part of which was lying outside upon the ground. Afterward there was a strife between the parties to gain and regain possession, including some injunction proceedings. Campbell did regain a scrambling possession of one building, but subsequently lost it to Wilson, and thereupon the present proceeding was brought. He filed a complaint in the court of Topeka, alleging that the defendant "unlawfully entered" the premises and "unlawfully and forcibly detains said premises." After the appearance of the parties, and after the plaintiff had produced his evidence in that court, he was permitted to amend the complaint by alleging an unlawful and forcible entry. The extent of the amendment was to add the words "and forcible" to the allegation of an "unlawful" entry. The trial resulted in a judgment for the defendant, and the plaintiff appealed to the district court, where he was successful.

It is first contended that the district court was not ¹⁶¹ authorized to try the case on the amended complaint alleging an "unlawful and forcible entry," when the original complaint only alleged an "unlawful entry." The amendment was permissible. In one sense the term "unlawfully entered" is broad enough to include a forcible entry. But assuming that it is defective, the theory of the code is that defects in pleadings

may be cured by amendments, and judgments have been reversed because the trial court would not permit defects in such complaints to be amended: *Schuster v. Gray*, 8 Kan. App. 222, 55 Pac. 489. In *Armour Packing Co. v. Howe*, 68 Kan. 663, 75 Pac. 1014, the manner in which such a complaint is considered was before the court, and it was said: "The proceeding, however, is a summary one for the speedy adjustment of controversies about possession, and, as it is cognizable before justices of the peace not familiar with pleading, it would indicate that it was never intended that the strict and technical rules of pleading should be applied to complaints in these actions."

It is next argued that as the lease had expired Wilson, the owner, was entitled to occupy his property, and that having gained possession he was entitled to retain the same even by force. If the owner entitled to possession can legally obtain it he may undoubtedly hold the same, but he has no right to resort to unlawful and forcible means to gain possession. The remedy of forcible entry and detainer is provided so that possession of real property may be obtained in a judicial and orderly way and without resorting to violence or steps likely to provoke a breach of the peace. Having this remedy, no one is permitted to vindicate his claimed rights with his own hand: *Campbell v. Coonradt*, 22 Kan. 704.

It is said that Wilson's men in gaining an entrance and dispossessing Campbell did not exercise such force as is necessary to render this remedy available. While ¹⁶² the action of forcible entry requires that the entry and ouster shall be forcible, no great degree of force or of personal violence is required to be used or threatened to constitute a forcible entry. There was no lack of force, however, in dispossessing Campbell. There was a considerable display of force, too, as a number of men acting together invaded the premises, opened the buildings, and threw the goods out. They took advantage of the absence of Campbell and his agent, and hence there was no more resistance to the entry than locked doors afforded. While little force was required to unlock the doors, considerable force was exercised in detaching and removing the furnishings and fixtures in the buildings, and force was used in the effort to keep him out. In *Burdette v. Corgan*, 27 Kan. 275, it was said: "But even where an entry is made in the absence of the party entitled to the possession, and afterward he appears, and the party making the entry keeps him out of possession by force—this is sufficient to authorize the party

entitled to possession to maintain the action of forcible entry and detainer against the wrongdoer."

It has been held that every unlawful entry upon the possession of another is, in the eye of the law, a forcible entry, and that where possession surreptitiously obtained is maintained by force the entry will be considered forcible: *Burt v. State*, 2 Tread. (S. C.) 489. Without giving unqualified approval to that rule, it is enough for the present case that the unlawful entry was accompanied by some force; that it was maintained by force, and was of such a character that under our authorities Campbell was entitled to avail himself of the remedy of forcible entry and detainer: *Campbell v. Coonradt*, 22 Kan. 704; *Coonradt v. Campbell*, 25 Kan. 227; *Burdette v. Corgan*, 27 Kan. 275. See, also, *Cathcart v. Walter*, 14 Mo. 17; *Febes v. Tierman*, 1 Mont. 179.

The court rightly told the jury that not even an ¹⁶³ owner has a right forcibly to take real estate from the peaceable possession of another, no matter how justly he may be entitled to it, and that if Campbell was in the peaceable possession of the premises, and Wilson's men entered the premises when the doors were locked and removed his goods during his absence and against his will, and while his possession continued, it would constitute a forcible entry under the law of this state. The action of forcible entry and detainer brought to obtain the possession so wrested from Campbell cannot be regarded as a moot case. Assuming that the testimony of the plaintiff was true, as the jury must have found, Wilson was not justified, whatever right he may have had in the premises, in taking forcible possession of the same. It has been said: "One great object of the forcible entry act is to prevent even rightful owners from taking the law into their own hands and attempting to recover, by violence, what the remedial process of a court would give them in a peaceful mode": *Mitchell v. Davis*, 23 Cal. 381.

The law of the case was fairly presented in the instructions given by the court, and no grounds are found for reversal.

The judgment is affirmed.

THE RIGHT TO A CIVIL ACTION FOR FORCIBLE ENTRY AND DETAINER.

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I. Scope of Note and Definitions.

In our note to *Washington v. Moore*, 120 Am. St. Rep. 32, we treated of unlawful detainer, excluding all questions of pleading and practice. Our present purpose is to give a like consideration to forcible entry and detainer, but without referring to the criminal prosecutions which, under the common law, or any of the American statutes, might grow out of either. The terms "forcible entry and detainer" are in common use, but there is rarely any proceeding to which both terms apply, but, of course, it is possible that force may be an element both of an entry and a detainer, and that the plaintiff may commence a proceeding relying upon both. More commonly the proceeding is based upon the forcible entry only, the subsequent continuance in possession of the wrongdoer being sufficient to maintain the action, whether or not any force, threat, or menace has been used after the possession was once acquired. We showed with respect to the action of unlawful detainer that force was not an essential element and generally was not present at all, and that the remedy was usually applicable only to those who, or whose predecessors in interest, had parted with possession under some lease or other contract, by the forfeiture or termination of which they had become entitled to have such possession restored. To the proceeding which we are now considering the relation of landlord and tenant or any other contract relation is not essential and rarely existent, and, on the other hand, force or something which the statute makes equivalent thereto is indispensable. The remedy is not available merely because a lease has been forfeited or otherwise terminated: *Kellogg v. Lewis*, 28 Kan. 535; nor is it in the nature of, or a substitute for, the action of ejectment: *O'Neill v. Jones*, 72 Minn. 746, 75 N. W. 701; or of any proceeding to quiet or determine title: *Watson v. Scarbrough*, 147 Ala. 689, 40 South. 672. Forcible entry is a remedy for the benefit of all persons who, being in the peaceable possession of real property, are dispossessed thereof by force or by threats or menaces of violence, and the possession so taken subsequently withheld from them: *Castro v. Tewksbury*, 69 Cal. 562, 11 Pac. 339; *Robinson v. Crummer*, 10 Ill. 218; *Saunders v. Robinson*, 5 Met. 343; and in addition to affording this remedy, the object of the statute is to prevent breaches of the peace and criminal disorder which would ensue from the withdrawal of the remedy and the reasonable hope such withdrawal would create, that some advantage must accrue to those persons who, believing themselves entitled to the possession of property, resort to force to gain such possession rather than to asserting their claims by some appropriate action in the

courts: *Lobdell v. Keene*, 85 Minn. 90, 88 N. W. 426; *Iron Mountain etc. R. R. Co. v. Johnson*, 119 U. S. 608, 7 Sup. Ct. Rep. 339, 30 L. ed. 504; note to *Mosseller v. Deaver*, 19 Am. St. Rep. 544. A forcible entry, except where some statute has interposed to change the meaning of these terms, is an entry upon real property peaceably in the possession of another against his will, without authority of law, by actual force, or with such an array of power and apparent intent to employ it for the purpose of overcoming resistance, that the occupant in yielding and permitting possession to be taken from him must be regarded as acting from a well-founded apprehension that his resistance will be perilous or unavailing: *Lissner v. State*, 84 Ga. 669, 20 Am. St. Rep. 389, 11 S. E. 500; *Lewis v. State*, 99 Ga. 692, 59 Am. St. Rep. 255, 26 S. E. 496; *Williams v. State*, 120 Ga. 488, 48 S. E. 149; *State v. Mills*, 104 N. C. 905, 17 Am. St. Rep. 706, 10 S. E. 676; *State v. Lawson*, 123 N. C. 740, 68 Am. St. Rep. 844, 31 S. E. 667; *State v. Robbins*, 123 N. C. 730, 68 Am. St. Rep. 841, 31 S. E. 669. Forcible detainer, on the other hand, is controlled by circumstances existing after the entry, whether it is forcible or not, and may, and usually does, consist of the unlawful withholding or detention of real property by force or by threats or menaces after the making of a peaceable, though unlawful, entry thereon: *Wright v. Lyle*, 4 Ala. 112; *Keller v. Henry*, 24 Ark. 575; *Dickinson v. Maguire*, 9 Cal. 46; *Valencia v. Couch*, 32 Cal. 339, 91 Am. Dec. 589; *Brawley v. Risdon Iron Works*, 38 Cal. 676; *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447; *Gipe v. Cummings*, 116 Ind. 511, 19 N. E. 466; *Burdette v. Corgan*, 27 Kan. 275; *Davis v. Woodward*, 19 Minn. 174; *McCleary v. Crowley*, 22 Mont. 245, 56 Pac. 227; *Brown v. Feagins*, 37 Neb. 256, 55 N. W. 1048; *Blachford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101.

II. Who may Proceed for.

a. Any Person Whose Possession was Forcibly Devested.

1. **The General Rule.**—As the right to maintain the action is not dependent upon title, it follows that it may be maintained by any person whose possession of real property is forcibly taken from him: *Hammond v. Doty*, 184 Ill. 246, 56 N. E. 371; *Clark v. Langenbach*, 130 Fed. 755, 65 C. C. A. 181; and in those cases and under those circumstances in which the forcible taking is not essential, by any person from whom possession was forcibly or wrongfully withheld.

2. **Married Women.**—Where a husband and wife are living on land which belongs to him or to them as community property, there is no doubt that she need not be joined as a party plaintiff in the action to recover possession: *State v. Henning*, 26 Mo. App. 119. Nor is this rule necessarily rendered inapplicable where the property belongs to her as her separate estate: *Gray v. Dryden*, 79 Mo. 106; *Funkhauser v. Coloty*, 67 N. J. L. 132, 50 Atl. 580. The action being possessory, it is not necessary as between the husband and wife, to inquire whose possession it was that was forcibly taken, and if in fact, or in contemplation of law, the possession was that of a wife, she may main-

tain the proceeding, whether the property is her separate estate, or, because of her husband's desertion or if for some other reason, it was in her possession and not his: *Hurst v. Thompson*, 68 Ala. 560; *Davis v. Woodward*, 19 Minn. 174; *Bobb v. Taylor*, 25 Mo. App. 583. In Maine, where a conveyance was executed by a husband for the purpose of defeating his wife's alimony, it was held, on a decree being subsequently rendered in her favor, that she might recover the property by a proceeding in forcible entry and detainer: *Bailey v. Bailey*, 61 Me. 361.

3. **Corporations.**—If a corporation is in possession of real property, and such possession is forcibly taken from it, it may; equally with a natural person, maintain a proceeding to recover such possession, and this rule applies in favor of cities, counties and other municipal corporations: *Crittenden v. Leavenworth*, 62 Miss. 32; *City of Norfolk v. Cooke*, 27 Gratt. 430.

4. **Agents and Other Persons Holding Possession for Another.**—If possession is held by an employé or other agent, it is nevertheless the possession of the employer or principal, and an unlawful invasion of such possession is a wrong to him for which an action or proceeding should be brought in his name rather than in theirs. Therefore, upon principle, the action of forcible entry should not be maintainable by an employé or agent: *Mitchell v. Davis*, 20 Cal. 45; *Hoffman v. Reichert*, 31 Ill. App. 558; *Kercheval v. Ambler*, 4 Dana, 166. It must, however, be admitted that while there has been no dissent from the general principle thus stated, there have been several decisions in which, under the peculiar circumstances of the cases, the possession of property by an agent has been held to be such as to support an action by him when it was forcibly taken from him by a stranger: *House v. Camp*, 32 Ala. 541; *Central Park B. Church v. Patterson*, 9 Misc. Rep. 452, 30 N. Y. Supp. 248; *Bradley v. Bell*, 34 S. C. 107, 12 S. E. 1071.

5. **Tenants and Lessors.**—The possession held by a tenant, while it is under and in subordination to his lease, is still not the possession of a mere agent or employé, but that of a tenant. The possession is held for, but not by, the landlord, and the result is that the tenant may, and the landlord may not, maintain a proceeding for a forcible entry made while the actual possession is in the tenant: *King v. Duncan*, 62 Ark. 588, 37 S. W. 228; *Polack v. Shafer*, 46 Cal. 270; *Hammel v. Zoberlein*, 51 Cal. 532; *Norris v. Pierce*, 47 Ill. App. 463; *Floersheim v. Bude*, 110 Ill. App. 536; *Hardisty v. Glenn*, 32 Ill. 62; *Allen v. Webster*, 56 Ill. 393; *Quertemus v. Breckenridge*, 5 Dana, 125; *Trabue v. Talbot*, 6 J. J. Marsh. 602; *Hudgen v. Temple*, 12 B. Mon. 198; *Commonwealth v. Bigelow*, 3 Pick. 31; *Hammel v. Atkinson*, 82 Miss. 465, 34 South. 225; *McCartney's Admr. v. Alderson*, 49 Mo. 456; *Elliott v. Lawless*, 6 Heisk. 123; *Hays v. Porter*, 27 Tex. 92; *Guffy v. Hukill*, 34 W. Va. 49, 26 Am. St. Rep. 901, 11 S. E. 754, 8 L. R. A. 759; *Pitman v. Davis*, Hemp. 29, Fed. Cas. No. 11,184a. A mere lodger on premises is not in such possession as

entitles him to maintain this proceeding: *Baragiano v. Villani*, 117 Ill. App. 372. A landlord may remain on the premises without being in possession, as where he retains a room in a hotel which he has leased, in which event, his tenant is the only party competent to maintain the action for a forcible entry: *Polack v. Shafer*, 46 Cal. 270. It is not, however, the fact of the leasing which controls, but the fact of possession, and if, notwithstanding his having executed the lease, the lessor remains in possession of the property, or some part of it, he may maintain forcible entry against a person other than his lessee who forcibly enters upon the property and retains possession: *Bowers v. Cherokee Bob*, 45 Cal. 495. Where the action is for a forcible entry on lands and carrying away timber and fences, the landlord may maintain an action to recover damages therefor in Kentucky, under a provision of the statute of that state to the effect that the owner of any land may maintain an appropriate action to recover damages for any trespass or injury committed thereon, notwithstanding such owner may not have the actual possession of the land at the time of such commission: *Holderman v. Middleton*, 6 Bush, 44.

6. *Tenants in Common*.—If it were strictly true that questions of title could never be presented for determination in proceedings for forcible entry and detainer, then it would be impossible to inquire in such a proceeding whether the plaintiff was an owner or possessor in severalty or in cotenancy. The fact that plaintiff's claims and rights were those of a cotenant has, however, often been urged (1) when it is claimed that he has sued alone and his cotenants should have been joined with him, or that all had been joined when one should have sued alone, or (2) when there is no question of joinder, but it is claimed that the plaintiff, being a cotenant, this fact limits or defeats his right of recovery. In the first place, it is clear, under the American statutes, that all the cotenants may join when a forcible entry has been made upon lands theretofore possessed by all, but, on the other hand, there appears to be no necessity for such joinder, and a tenant in common who has been subjected to a forcible entry cannot be deprived of his right to recover possession of the whole of the property from a stranger to the title by proof of the cotenancy: *Bowers v. Cherokee Bob*, 45 Cal. 495; *Mason v. Bascom*, 3 B. Mon. 269; *Turner v. Lumbrick*, Meigs, 7; *Jones v. Phillips*, 10 Heisk. 562. If, however, the person making the forcible entry is another tenant in common, the one forcibly dispossessed may maintain a proceeding to be restored to his possession: *Bowers v. Cherokee Bob*, 45 Cal. 495; *Mason v. Finch*, 2 Ill. 495; *Taylor v. White*, 1 T. B. Mon. 37; *Eads v. Rucker*, 2 Dana, 111; *Mason v. Bascom*, 3 B. Mon. 269; *Presbrey v. Presbrey*, 13 Allen, 281; *Rabe v. Taylor*, 10 Smedes & M. 400, 48 Am. Dec. 763; *Lewis v. Oesterreicher*, 47 Mo. App. 79; but it is probable that the cotenancy may be successfully relied upon for the purpose of preventing a recovery of the entire possession, and that the judgment in favor of the plaintiff may be restricted to placing him in possession of the property with his cotenants: *Jamison v. Graham*, 57

Ill. 94; *Eads v. Rucker*, 2 Dana, 111; *Presbrey v. Presbrey*, 13 Allen, 281. To so hold must, we confess, be to admit that title, to this extent at least, may be tried and determined in a proceeding of forcible entry, and that a party owning but a moiety of property may resort to force to get himself into the possession which would not be permitted were he an owner in severalty.

7. **Grantors and Assignees.**—As the cause of action for forcible entry vests at once in the person dispossessed, he may maintain proceedings, though at the commencement of his action he has conveyed the property to another: *Dudley v. Lee*, 39 Ill. 339. If a conveyance is made pendente lite, the action does not abate, but may be continued in the name of the grantee: *Anderson v. Ferguson*, 12 Okla. 307, 71 Pac. 225; and whether so continued or not, he is entitled to the benefit of the judgment subsequently rendered in favor of the plaintiff: *Bell v. Bruhn*, 30 Ill. App. 300.

b. Persons Claiming Under an Owner or Occupant.

1. **Grantees and Other Purchasers.**—The right of action for forcible entry vests at once in the party whose possession was divested thereby, and may be enforced only by him, and does not pass to his assignee or grantee: *Dudley v. Lee*, 39 Ill. 339; *Fitzgerald v. Quinn*, 165 Ill. 354, 46 N. E. 287; *Yoder's Heirs v. Easley*, 2 Dana, 245; and general words in a statute purporting to give this right of action to a person entitled to the possession will not be construed as referring to the grantees of the person dispossessed, but as the whole proceeding is within legislative control, statutes have been enacted and enforced which clearly give the right to the grantee: *Fisher v. Smith*, 48 Ill. 184; *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. 432; and purchasers at judicial sales are entitled to the benefit of such statutes: *Pensoneau v. Heinrich*, 54 Ill. 271.

2. **Heirs and devisees.**—If persons actually in possession of property claim as heirs or devisees, and are subjected to a forcible entry, no doubt they may maintain the appropriate proceeding to recover possession, for in such proceeding the source of their title or of the person from whom they derived, or claim to have derived, it is immaterial: *Hightower v. Fitzpatrick's Heirs*, 42 Ala. 597; *Yoder's Heirs v. Easley*, 2 Dana, 245. Nor is this rule made inapplicable by the fact that administration is still pending on the estate of their ancestor or testator, and the administrator might, if he chose to do so, claim possession of the property and the right to dispose of it for the purpose of satisfying the debts of the decedent: *Kellum v. Balkum*, 93 Ala. 317, 19 South. 463. Whether an heir or devisee may maintain this proceeding where the forcible entry occurred in the lifetime of the ancestor or decedent we have not seen discussed, but the same considerations which control proceedings by grantees hereinbefore referred to should, upon principle, be applied to those whose rights rest on devise or descent. If the forcible entry takes place after the death of the former occupant and before his heir or devisee has taken

possession, it is probable that, in contemplation of law, the possession of the decedent must be regarded as continuing for the benefit of his heirs or devisees, and that they may maintain an action for the forcible entry, though made before they have actually taken any possession: *Brown v. Burdick*, 25 Ohio St. 260.

3. **Administrators and Executors.**—Doubtless at the common law an administrator or executor could not maintain the action of forcible entry where the cause thereof accrued during the lifetime of the decedent, for the obvious reason that the possession had not been taken from the personal representative and he was not entitled to the possession of the ancestor or testator: *Beezley v. Burgett*, 15 Iowa, 192; *Prewitt v. Durham's Exrs.*, 5 T. B. Mon. 17. The right to maintain the proceeding has sometimes, though rarely, been given by statute: *Beezley v. Burgett*, 15 Iowa, 192; and the cases involving it, even then, have generally been restricted to instances where the forcible entry took place after the death of the former occupant, and his personal representative was in fact, or in contemplation of law, in possession of the property: *Espalla v. Gottschalk*, 95 Ala. 254, 10 South. 755; *Lass v. Eisleben*, 50 Mo. 122; *Bulkley v. Sims*, 48 W. Va. 104, 35 S. E. 971.

4. **Receivers.**—If the possession of real property is for any purpose taken by a receiver and is afterward forcibly taken from him, he may, in his own name, maintain a proceeding in forcible entry and recover such possession: *Baker v. Cooper*, 57 Me. 388.

5. **Licensees and Persons Entitled to Easements.**—If a person, though entitled only to the rights of a licensee or of a holder of an easement, were in possession of real property connected therewith, there would exist no more right to forcibly dispossess him than to forcibly dispossess any other person whose possession happened not to be sustained by his title, and especially must this be true when the easement or license gives the occupant of real property a right to an exclusive possession thereof, as where it is an easement to maintain a railway or a toll road and the appliances necessary thereto: *Farley v. Bay Shell R. Co.*, 125 Ala. 184, 27 South. 770. This relation to the property is not usual with respect either to licensees or persons entitled to easements, and they cannot ordinarily maintain proceedings in forcible entry, for the reason that their situation and rights are not such that a forcible entry can be regarded as an invasion of their property: *McHose v. South St. Louis F. L. Co.*, 4 Mo. App. 514; *Rochester v. Gate City M. Co.*, 86 Mo. App. 447; *Lowe v. American Z. etc. Co.*, 89 Mo. App. 680; *Roberts v. Trujillo*, 3 N. Mex. 50, 1 Pac. 855; *Becher v. New York*, 102 App. Div. 269, 92 N. Y. Supp. 460.

c. **Joinder or Severance in Prosecution.**—If a possession is held by two or more persons as tenants in common when a forcible entry is made, they may, under most of the statutes, join in proceedings to recover such possession, but their joinder does not appear to be necessary, and either, if his possession was taken, may separately sue

and maintain proceedings: *Bowers v. Cherokee Bob*, 45 Cal. 295; ante, II, a, 6. If, on the other hand, two or more persons hold in severalty, and their possession is taken from them by a forcible entry, though it consists of a single act committed by the same person or persons, it is probable that each person so dispossessed must bring a separate proceeding to recover his possession.

III. Who may and should be Parties Defendant.

a. Any Person Guilty of the Acts Complained of.

1. **The General Rule.**—It may be assumed that every person who has participated in the acts complained of is a proper party defendant to the proceeding to recover possession: *Nauman v. Burch*, 91 Ill. App. 48; provided he remains in possession of the property, for, as the proceeding is to recover possession, there is no doubt that it is not maintainable against a person not in possession when it was commenced: *Preston v. Kehoe*, 10 Cal. 445; *Bowman v. Mehring*, 34 Ill. App. 389; *Eads v. Rucker*, 2 Dana, 111; *Orrick v. St. Louis Public Schools*, 32 Mo. 315; though he was guilty of the forcible entry and at some time prior to the beginning of the proceeding and after he made the entry, he might have been a proper and even necessary party defendant: *Preston v. Davis*, 112 Ill. App. 636; *Armstrong v. Hendrick*, 67 Mo. 542; *Jennings v. Robinson*, 82 Mo. App. 544; *Loan v. Smith*, 76 Mo. App. 510; *Armstrong v. Hendrick*, 67 Mo. 542; *Hurst v. Dulaney*, 84 Va. 701, 5 S. E. 802.

2. **Married Women.**—Though a married woman rarely commits the acts necessary to constitute a forcible entry, yet it is conceivable that she may do so, especially when acting by agents or employes, and when such is the case, doubtless the party whose possession is forcibly taken has the same right to proceed against her as if she were a man or an unmarried woman. The husband is, by the common law, entitled to be in possession of the lands of his wife, and hence she may not be a necessary party, though the land sought to be recovered is claimed to be her separate property: *Wilson v. Garaghty*, 70 Mo. 517; *Gray v. Dryden*, 79 Mo. 106; and the courts have gone very far toward maintaining, though a wife is apparently the more active of the two in making a forcible entry, that she nevertheless acted for her husband, and that he is the proper party defendant: *Bauerschmitz v. Bailey*, 29 Ill. App. 295. Still there is no reason to doubt that if a husband and wife join in a forcible entry, they may properly be united as defendants in the proceeding to recover the possession: *Porter v. Murray* (Cal.), 12 Pac. 425; *State v. Harvey*, 3 N. H. 65; and perhaps the better view is, especially under statutes undertaking to provide for and protect the rights and interests of married women in their separate property, that if a wife is in possession of property claiming it to be her separate estate, she should be united in any proceeding, even though it be in the nature of forcible entry and detainer, in which the enforcement of the judgment sought may tend to

deprive her of a possession to which she is entitled: *Farley v. Tillar*, 81 Va. 275; and certainly there is nothing in the disability of coverture or infancy which prevents an infant or a married woman from being made a party defendant to an action of forcible entry and detainer: *Skipwith v. Johnson*, 5 Cold. 454.

3. **Corporations.**—Artificial as well as natural persons may be guilty of the acts constituting a forcible entry and detainer, and hence are proper parties defendant in an action therefor, and this rule applies to municipal corporations: *Rains v. City of Oshkosh*, 14 Wis. 372; though the premises of which they took possession are claimed by them as a public street: *City of Edwardsville v. Barnsback*, 66 Ill. App. 381.

4. **Agents and Other Persons Holding Possession for Others.**—Though a person committing a wrongful act is an agent or servant of another, this does not release his liability to the person injured thereby, who may proceed to recover therefor against the agent as if he were the principal: *Greenberg v. Whitcomb L. Co.*, 90 Wis. 225, 48 Am. St. Rep. 911, and note, 63 N. W. 93, 28 L. R. A. 439. This rule applies to forcible entry: *Luling v. Sheppard*, 112 Ala. 588, 21 South. 352; *Young v. Bingo*, 1 Litt. 225; especially where the servant or employé remains in possession of the property at the commencement of the action: *Blumenthal v. Waugh*, 33 Mo. 181. The liability of an agent or employé does not exclude liability on the part of his principal or employer. Hence, though an agent assist in a forcible entry, or, indeed, though he was the only party personally participating therein, his principal may be liable therefor and be a proper, and sometimes the only proper, party defendant: *Minturn v. Burr*, 20 Cal. 48. Both the principal and his agent may be united as parties defendant, if both remain in possession of the property when the action is brought: *Blumenthal v. Waugh*, 33 Mo. 181.

5. **Tenants and Lessors.**—The best test by which to determine who should be parties defendant to an action for forcible entry is to inquire who were guilty, either in person or by agents, of the acts amounting to the forcible entry, and who remain in possession so that a judgment in favor of plaintiff may not be sufficient to obtain him complete relief unless they were removed from the property. It is not material whether the person making the forcible entry did so, resting his right on a claim that he was a lessor or lessee, for in either event, he must surrender his possession if his entry was forcible, and the fact that he has given or received a lease of the property is no protection to him: *Michau v. Walsh*, 6 Mo. 346; *Blackman v. Welsh*, 44 Mo. 41. A lessor may be guilty of a forcible entry as against his lessee, and if so, the latter is entitled to the same remedy as against a stranger to the title: *Lasserot v. Gamble* (Cal.), 46 Pac. 917.

6. **Tenants in Common.**—While the title, or claim of title, of the persons making a forcible entry does not need to be considered in

determining whether they should be made parties defendant, yet it may, and often does, happen that they own or claim as tenants in common, and when such is the case, they may, and should be, joined as parties defendant.

7. **Grantees and Other Owners.**—The owner of the fee or other person entitled to the possession of the property may be made a party defendant, and a judgment recovered against him, if his entry was of a character to justify the restoration of the possession to the person from whom it was forcibly taken: *Farncomb v. Stern*, 18 Colo. 279, 32 Pac. 612; *Judy v. Citizen*, 101 Ind. 18; *Davis v. Lee*, 2 B. Mon. 300; *Young v. Young*, 109 Ky. 123, 58 S. W. 592; *White v. Wells' Exrs.*, 5 Mart. (O. S.) 652; *Emerson v. Sturgeon*, 59 Mo. 404. As to persons who claim to be grantees of those making forcible entries or otherwise to have succeeded to their possession and rights, the decisions are strangely silent. It is clear that if such successors do not participate in the forcible entry, they are not subject to any of the penalties thereof, and while, if both they and the persons who were guilty have a joint possession at the time the action was brought, they also might be made parties thereto, to the end that the judgment when recovered would afford plaintiff a complete and adequate remedy by placing him again in possession of the property. If, on the other hand, the original wrongdoer is no longer in possession, no recovery, as we have shown, can be had against him in this proceeding: *Ante*, III, a, 1; and it would surely be inconsistent with the general nature of the proceeding to maintain it solely against persons who had no complicity in the wrongful acts of which complaint is made. After a judgment is entered, the defendants cannot prevent the plaintiff from being put in possession by an execution issued thereon by turning such possession over to third persons: *Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711. Persons entering into possession of the property after the forcible entry thereon of another with whom they are not in privity or collusion are not subject to an action based upon such forcible entry: *Kennedy v. Hamer*, 19 Cal. 374; *Balance v. Curtenius*, 3 Gilm. 449.

8. **Public Officers and Persons Placed in Possession by Them.**—In an action of forcible entry and detainer against a sheriff who entered on the plaintiff's premises for the purpose of levying a writ against a third person and assumed exclusive control of such premises for twenty hours or more, it was held that the officer at most was liable only to an action of trespass, and that the proceeding actually instituted was not maintainable because defendant was not in possession of the property when it was commenced, and furthermore that while an officer is "in the performance of a legal duty, he can never subject himself to the highly penal action of forcible entry": *Link v. Harrington*, 23 Mo. App. 429. This opinion was based upon the language of the court in *Drehman v. Stifel*, 41 Mo. 184, 97 Am. Dec. 268, where the wrong complained of was the action taken by a mili-

tary officer acting under orders of his superior and where there was "no evidence of any actual appropriation of the plaintiff's property beyond the military occupation of the premises and the waste committed in clearing the ground for the use of camps and quarters"; and "for this use of his lot, as well as the property destroyed, he was entitled to look to the government for compensation." It is not difficult to conceive that occasions on which public officers may become answerable for forcible entries and detainers must be rare, even though they may interfere with the possession of property without sufficient authority therefor, for generally their unauthorized acts are merely trespasses, and not of such permanency or intent as to fall within the evils intended to be lessened or prevented by the enactment of statutes defining and controlling the subjects of forcible entry and detainer. Nevertheless, we cannot concede their immunity from actions of this class when really guilty of the acts denounced by the statutes as forcible entries, and not justified by the writs under which they act, though we must admit of decisions to the contrary: *Janson v. Brooks*, 29 Cal. 214.

The question whether persons forcibly and wrongfully entering upon possession of real property under writs and with the aid of officers of the law may be dispossessed is perhaps closely connected with the right to maintain actions against the officers themselves and involved in like doubts, except that, as to the officers, their possession is generally so temporary that before any proceeding can be commenced such possession has ceased, and the right to subject them to a possessory action, if it ever existed, has terminated. It needs no argument or citation to show that if the writ justified the officer in forcibly taking and delivering possession to the person for whom it was taken, and to whom it was delivered, then no summary action can be sustained against either; but in some instances the acts of the officer are not justified by his writ, either because it is void or the person dispossessed was not a party to the action in which it issued, or for some other good reason was not a person against whom there was any right to enforce it. It is true that in either case the party against whom the writ is wrongfully employed has a remedy by application to the court issuing it for an order directing him to be restored to his possession, and this consideration, among others, has determined many courts against permitting the person forcibly placed in possession by an officer acting under a writ, especially where there is no ground for deeming his action to have been taken in bad faith, from resorting to a proceeding for forcible entry and detainer, though the action of the officer is not justified, and the party dispossessed ought by some appropriate proceeding to recover his property: *Janson v. Brooks*, 29 Cal. 214; *Vess v. State*, 93 Ind. 211; *Scott v. Newsom*, 4 Sneed, 457; *Rook v. Godfrey*, 105 Tenn. 534, 58 S. W. 850. The authorities upon this question are so evenly balanced that it is impossible to say on which side the preponderance lies. Among those maintaining the right to recover possession by forcible entry and detainer are *Morrissey v. Stephenson*, 86 Ill. 344; *Brush v. Fowler*, 36 Ill. 53, 85 Am. Dec.

382; Hubner v. Feige, 90 Ill. 208; Wallace v. Hall, 22 Kan. 271; Norton v. Sanders, 7 J. J. Marsh. 12; Chiles v. Stephens, 1 A. K. Marsh. 334; Laird v. Winters, 27 Tex. 440, 86 Am. Dec. 620. Of course, it must be conceded that the action cannot be maintained on proof that the issuing of the writ was merely irregular, or that the affidavit under which it was procured or on which the judgment was founded is false: Sewell v. State, 61 Ga. 496. It has been held that a person dispossessed under a void writ, or one for some other reason not justifying his dispossession, may return, repossess himself of, and continue to occupy the property, if he can do so without being guilty of force or violence, and hence is not subject to an action for forcible or unlawful detainer: State v. Billings, 15 Fla. 318; Kercheval v. Ambler, 7 J. J. Marsh. 626, 23 Am. Dec. 446; but see Kercheval v. Ambler, 4 Dana, 166.

b. **Persons Claiming Under Others Who have been Guilty of Forcible Entries.**—Persons of the several classes hereinbefore considered in subdivision II, b, 1-5, and perhaps others, may come into possession of the property after the original forcible entry thereon has been consummated and thereby succeed to whatever right or title the person making the forcible entry had when it was made or subsequently, and claiming such right, may have possession of the property in which such entry was made. Where, however, they do not participate in the forcible entry, we believe they are not subject to any action founded thereon, and that possession, if recoverable from them at all, must be obtained by ejectment or some equivalent action: Cagwin v. Chicago & N. W. R. Co., 114 Iowa, 129, 86 N. W. 220; but we confess our failure to discover any authority bearing directly on this subject.

c. **Joinder of Defendants.**—All who participated in the original forcible entry and who remain in possession of the property may be joined as defendants, but if it consists of distinct parcels, persons forcibly entering upon different parts and holding and claiming in severalty cannot be joined in one proceeding: Gould v. Hendrickson, 9 Ill. App. 171; Reynolds v. Thomas, 17 Ill. 207; Kerr v. Phillips, 5 N. J. L. 818. In Illinois, the law upon this subject has been so far modified by statute that if several persons are in possession of distinct tracts in severalty, but under one lease, they may be joined as defendants, but the judgment against each must be only for the part held by him: Springer v. Cooper, 11 Ill. App. 267; Godard v. Lieberman, 18 Ill. App. 366; Humphreville v. Davis, 27 Ill. App. 142.

IV. Subject Matter of the Action or Proceeding.

The action of forcible entry and detainer is restricted to recovering possession of real property. Therefore it is not available as a remedy for the purpose of recovering possession of personalty: Hoffman v. Reichert, 31 Ill. App. 558. Hence, if, in contemplation of law, a house is personal property, it is not property subject to a proceeding

for forcible entry: *Kassing v. Keohane*, 4 Ill. App. 460; *Field v. Higgins*, 85 Me. 339. So, where the right of the plaintiff is merely that of a person entitled to the benefit of a license or easement, he cannot, though forcibly prevented from entering into or exercising it, maintain a proceeding in forcible entry: *Ante*, II, b, 5; *Moye v. Thurber*, 146 Ala. 180, 40 South. 822; *Gibbs v. Drew*, 16 Fla. 147, 26 Am. Rep. 700; *Rees v. Lawless*, Litt. Sel. Cas. 184, 12 Am. Dec. 295; *Nelson v. Nelson*, 30 Mo. App. 184; *Becher v. New York*, 102 App. Div. 269, 92 N. Y. Supp. 460; *De Laine v. Alderman*, 31 S. C. 267, 9 S. E. 950. If, however, though as an incident to an easement or license, he is entitled to be and is in exclusive possession of real property, as, for instance, the lands on which the track of a railway is maintained, the action may be maintained for the forcible entry and detainer thereof: *Powers v. Tazewells*, 25 Gratt. 786; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Iron Mountain & H. R. Co. v. Johnson*, 119 U. S. 608, 7 Sup. Ct. Rep. 339, 30 L. ed. 504. The right to recover a ferry and the property used in connection therewith was denied in *Rees v. Lawless*, Litt. Sel. Cas. 184, 12 Am. Dec. 295, the court saying: "The only question which is deemed material to be decided is, whether a warrant for forcible entry will lie for forcibly taking possession of a ferry, and the banks and shores of a river, where the party so taking has a right of ferry established. We are of opinion it will not lie in such a case. A ferry is of that description of property which, in technical language, is denominated incorporeal, and which, in legal consideration, is not tangible, like a right of way or of common, or other incorporeal right, no entry in point of fact, can in strict propriety be said to be made upon it; nor could the sheriff, in case of a judgment of restitution, deliver possession. In such a case, an ejectment would not lie, and upon the same principle, a warrant for a forcible entry would not."

V. What Necessary to Maintain the Action.

a. Possession by the Plaintiff.

1. **Necessity for Peaceable and Exclusive.**—The action of forcible entry not being founded upon title, it is absolutely indispensable that the plaintiff should have been in the peaceable possession of the property when the entry was committed thereon: *Womack v. Bowers*, 50 Ala. 5; *O'Donohue v. Holmes*, 107 Ala. 189, 18 South. 263; *Childress v. McGehee*, Minor, 131; *Treat v. Stuart*, 5 Cal. 113; *Warburton v. Doble*, 38 Cal. 619; *Conroy v. Duane*, 45 Cal. 597; *Necklace v. West*, 33 Ark. 682; *Wier v. Bradford*, 1 Colo. 14; *Phelps v. Baldwin*, 17 Conn. 209; *Stiles v. Homer*, 21 Conn. 507; *Mann v. Brady*, 67 Ill. 95; *Kimmel v. Frazer*, 49 Ill. App. 462; *Hunt v. Hicks*, 3 Ind. Ter. 275, 54 S. W. 818; *McCracken v. Woodford*, 3 A. K. Marsh. 524; *Boyle v. Boyle*, 121 Mass. 85; *Woodside v. Ridgeway*, 126 Mass. 292; *Owen v. Monroe Co. Alliance*, 77 Miss. 500, 27 South. 383; *Wood v. Dalton*, 26 Mo. 581;

Sexton v. Hull, 45 Mo. App. 339; *Milligan v. Cuff*, 14 Mont. 366, 37 Pac. 455; *Mairs v. Sparks*, 5 N. J. L. 513; *Bennet v. Montgomery*, 8 N. J. L. 48; *Carter v. Newbold*, 7 How. Pr. 167; *People v. Wilson*, 13 How. Pr. 446; *Town of Oyster Bay v. Jacob*, 109 App. Div. 613, 96 N. Y. Supp. 620; *Lane v. Marshall*, Mart. & Y. 255; *Kuhn v. Feiser*, 8 Head, 82; *Rook v. Godfrey*, 105 Tenn. 534, 58 S. W. 850; *Pitman v. Davis*, Temp. 29, Fed. Cas. No. 11,184a. Of course, the proceeding is of statutory origin and control, and the remedy may be extended to persons entitled to possession as well as to those actually in possession when the entry was made, and this has been done in some of the states where the land entered upon was vacant and unoccupied: *Fowler's Admr. v. Knight*, 10 Ark. 43; *Frank v. Palmer*, 65 Ill. App. 124; *Fitzgerald v. Quinn*, 165 Ill. 354, 46 N. E. 287; *Price v. Olds*, 9 Kan. 66; *Comstock v. Cole*, 28 Neb. 470, 44 N. W. 487. It will be seen, in considering these statutes, that they provide for an unlawful detainer rather than for a forcible entry, for entry cannot be forcible if the property was not in possession of anyone. It follows, from what we have already said, that if by a constructive possession is meant only that possession which is presumed to be in the owner of the fee or other person entitled to the possession because the property is vacant or unoccupied, then the mere constructive possession of the plaintiff can never maintain the action, in the absence of some statute providing to the contrary: *Clements v. Hays*, 76 Ala. 280; *McGuire v. Cook*, 13 Ark. 448; *Treat v. Stuart*, 5 Cal. 113; *Weir v. Bradford*, 1 Colo. 14; *Dils v. Justice*, 10 Ky. Law. Rep. 547, 9 S. W. 290; *O'Neill v. Jones*, 72 Minn. 746, 75 N. W. 701; *Rochester v. Gate City M. Co.*, 86 Mo. App. 447; *Milligan v. Cuff*, 14 Mont. 366, 36 Pac. 455; *Gulledge v. White*, 73 Tex. 498, 11 S. W. 527. This rule is not rendered inapplicable by the fact that the plaintiff claims under a bargain and sale deed, and a statute of the state declares that such a deed vests the possession in the grantee to the extent of the estate intended to be conveyed: *Cuyler v. Estia*, 23 Ky. Law Rep. 1063, 64 S. W. 673.

2. *Duration of.*—What we have said in the preceding subdivision indicates that the possession of the plaintiff must have continued to the time of the forcible entry. It remains for us to consider when such possession must have begun. Undoubtedly many cases may be cited in which the possession of the plaintiff was held insufficient because of its having commenced but a brief period before the forcible entry, and especially when it was gained by force or taken during the absence of the prior occupant: *Hoag v. Pierce*, 28 Cal. 187; *Castro v. Tewksbury*, 69 Cal. 562, 11 Pac. 339; *Hodgkins v. Price*, 132 Mass. 196; *Harrington v. Scott*, 1 Mich. 17; *De Graw v. Prior*, 60 Mo. 56; *Dyer v. Reitz*, 14 Mo. App. 45. But the fact that the possession of the occupant was but recently acquired is material only to the extent that it may sustain the conclusion that it had or had not become actual and peaceable. If, from the whole evidence, it appears that the plaintiff was in the actual, peaceable

possession of the property, the fact that his possession was recently acquired does not excuse the forcible entry thereon, nor prevent his recovering of the person guilty thereof: *Frank v. Palmer*, 65 Ill. App. 124; *Dyer v. Chick*, 52 Me. 350; *Cain v. Flood*, 21 Civ. Pro. Rep. 116, 14 N. Y. Supp. 776, 38 N. Y. St. Rep. 196.

3. **Incomplete or Scrambling Possession.**—What we have said in the preceding subdivision as to the duration of the possession of the plaintiff has particular application to what is often called a scrambling possession, by which we understand the courts to mean the case of a contest between two or more persons for the possession of the property, of which contest one sometimes has the better and sometimes the other, or the case of a person who has forcibly entered on the possession of another who, not being informed of such entry, has had no opportunity to determine whether he will submit to it or not. Possession taken by force does not at once become peaceable within the meaning of the statute, so that it is protected from a forcible re-entry by the person who has been dispossessed. If the possession taken is incomplete and yet involved in a struggle, or is so recent that a struggle may yet be reasonably apprehended, while it is probable that the person in possession is not in law subject to the forcible entry of a person who is not a party to the struggle and has hitherto had no possession: *Bowers v. Cherokee Bob*, 45 Cal. 495; yet, as to the person on whom the entry has been made, the possession may yet be deemed scrambling and incomplete, or, at least, not peaceable and not sufficient to support an action against him should he subsequently regain possession: *Wray v. Taylor*, 56 Ala. 188; *O'Donohue v. Holmes*, 107 Ala. 489, 18 South. 263; *Johnson v. West*, 41 Ark. 535; *Hoag v. Pierce*, 28 Cal. 187; *Bowers v. Cherokee Bob*, 45 Cal. 495; *Voll v. Butler*, 49 Cal. 74; *Spiers v. Duane*, 54 Cal. 176; *Saulque v. Durralde* (Cal.), 33 Pac. 1090; *Cox v. Cunningham*, 77 Ill. 545; *Childers v. Hieronymous* (Ky.), 105 S. W. 979; *Williams v. McGaffigan*, 132 Mass. 122; *Garrison v. Savignac*, 25 Mo. 47, 69 Am. Dec. 448; *Newton v. Doyle*, 38 Mich. 645; *Keen v. Schweigler*, 70 Mo. App. 409; *Buck v. Endicott*, 103 Mo. App. 248, 77 S. W. 85; *Clay v. Sloan*, 104 Tenn. 401, 58 S. W. 229; *Tischler v. Knick*, 57 N. Y. Supp. 3; *O'Donnell v. McIntyre*, 2 N. Y. St. Rep. 689. The law upon the subject is better and more fully stated in *Bowers v. Cherokee Bob*, 45 Cal. 495, than in any other opinion coming within our observation. The court there said: "It may frequently be difficult to define the precise point at which a possession ceases to be a scrambling possession, maintained, it may be, by threats and menaces, and has ripened into a peaceable possession. No rule of universal application can be established in such cases, and each must, of necessity, be governed by its own circumstances. If A be in the undisputed occupation of a dwelling-house, residing in it with his family, and if, during the temporary absence of the family for an hour, B should intrude into the possession, barricade the doors, and on the return of A, immediately after,

should not only refuse to surrender the possession, but deter him from entering by threats and menaces, and if A should quietly submit to the wrong, and should leave B for some weeks or months wholly undisturbed in the possession, it cannot be doubted that B would have acquired a 'peaceable' possession, even as against A, which would enable him to maintain this form of action, if subsequently forcibly expelled by A. Though his original entry may have been fraudulent, and without the slightest color of right, nevertheless, if A submits to it, and allows him to remain quietly in the possession for a considerable period, he cannot afterward take the law into his own hands and repel the intruder by force. The possession, though wrongful, and at first maintained by menaces or violence, will have ripened into a peaceable possession, for a disturbance of which this form of action would be the appropriate remedy. The peace and good order of society demand that an actual and peaceable occupation of real estate, however it may have been originally acquired, shall not be disturbed by violence. But in the case supposed, if A, instead of quietly submitting to the wrong, had immediately come with an armed force, and had endeavored to expel B from the premises, it would be absurd to hold that B had such a 'peaceable' possession as would enable him, in an action of forcible entry and detainer, to evict A and recover the possession. His possession, though actual, was never 'peaceable'; and it would be a mockery of justice to hold that, under these circumstances, the law would aid the wrongdoer, who had only a temporary, scrambling possession, acquired by fraud or force, and maintained for a time by threats and violence to recover the possession from the former occupant. It was not for cases of that character that the forcible entry and detainer act was designed to furnish a summary remedy, but for cases wherein a 'peaceable' possession has been invaded. In such cases one of the issuable facts is whether or not at the time of the entry complained of the plaintiff had the 'peaceable' possession as against the defendants, or only a scrambling occupation, maintained by force or threats, and which had not ripened into a peaceable possession. As already stated, it is often difficult to decide whether an actual possession is a peaceable or only a scrambling occupation; and in the very nature of the case it is impossible to lay down an inflexible rule by which to determine whether a possession is a peaceable or a contested and scrambling possession. Each case must be decided by a jury, on its circumstances, under proper instructions from the court.

"It may be stated, however, as a general proposition, that if a person enter upon land in the actual and peaceable occupation of another, the possession which he acquires cannot be deemed to be peaceable during the time when it has to be protected by firearms, or other demonstrations of force, against an attempted or threatened re-entry of the former occupant, who manifests to the intruder, by his words and acts, that he intends to re-enter at the earliest moment when he

can do so without violence, and who is only prevented from entering by an exhibition of firearms, or threats and menaces. Such a possession cannot justly be said to be 'peaceable' in any sense, and certainly not in the sense of the statute. If the rule were otherwise, the most deplorable results would ensue. A ruffian might enter a private dwelling without color of right, and in mere wantonness expel its inmates, barricade the doors, and by an exhibition of firearms prevent the owner from approaching his own dwelling. The owner might make the most determined and persistent efforts to re-enter his own dwelling, but be as often repulsed by violence or threats; and if he should ultimately succeed, we apprehend no respectable court would hold that the intruder had acquired a 'peaceable' possession, on which he could maintain a forcible entry against the former occupant. If a different rule prevailed, it would operate as a premium upon lawless aggression, and an incentive to the grossest outrages, and no one would be safe in his possession of real property, if it was understood to be the law that any ruffian may intrude upon premises in the actual occupation of another, maintain his possession by force or menaces for a time, and when expelled by the former occupant after repeated unsuccessful efforts to regain the possession, might maintain an action for forcible entry, on the plea that he had acquired a 'peaceable' possession."

4. **Illustrations of Sufficiency of Possession.**—Possession is a question of fact, and while there are cases in which the facts are so far conceded, or established without contradictory evidence, that the court may affirm, as a proposition of law, that the plaintiff was in the peaceable possession when the forcible entry was made, yet this can rarely be so in a litigated case. Nor is it possible to form any test by which, in the case of conflicting evidence or of evidence from which different conclusions may be rationally drawn, one can always safely affirm that possession did or did not exist. In a general sense, it may be said that a party is in possession of property when he exercises dominion or control over it, not shared with any other person, and of such a character as owners of like property usually exercise over it: *Lorah v. Emmerson* (Ala.), 45 South. 228; *Potts v. Magnes*, 17 Colo. 364, 30 Pac. 58; *Hardin v. Sangamon County*, 71 Ill. App. 103; *St. Louis A. & M. Assn. v. Reinecke*, 21 Mo. App. 478; *Willis v. Stevens*, 24 Mo. App. 494; *Scott v. Allenbaugh*, 50 Mo. App. 130; *Hinniger v. Trax*, 67 Mo. App. 521; *Galligher v. Connell*, 35 Neb. 517, 53 N. W. 383; *Davidson v. Phillips*, 9 Yerg. 93, 30 Am. Dec. 393; as where it consists of a room in a building used by persons in the business of abstracters and conveyancers, and they keep therein their private books, stationery, and other appliances required for the transaction of their business: *Hardin v. Sangamon County*, 71 Ill. App. 103; or of a church to which persons go, place new locks on the door, fasten up doors and windows, and notify all persons present and within hearing of an intention to hold exclusive possession:

Sitton v. Sapp, 62 Mo. App. 197; or land upon which they go, plant a small crop, begin the erection of a house, mark the boundary lines, and commence inclosing the property: Hininger v. Trax, 67 Mo. App. 521. Fences or other inclosure of the property are not indispensable to its possession: Goodrich v. Van Landigham, 46 Cal. 601; Howard v. Whitaker, 22 Ky. Law Rep. 1775, 61 S. W. 355; Geoghegan v. Turner, 26 Ky. Law Rep. 537, 82 S. W. 244; Wall v. Nelson, 3 Litt. 395; King's Admr. v. St. Louis G. Co., 34 Mo. 34, 84 Am. Dec. 68. On the other hand, the erection of such fence or other inclosure, or the maintenance of it, after it has been lawfully acquired, especially if it keeps control of the livestock of the occupant or keeps from trespass or other intrusion the livestock of others, is sufficient, and very nearly conclusive, evidence of possession: Allen v. Tobias, 77 Ill. 169; Campbell v. Coonradt, 22 Kan. 704. The inclosure may consist partly of a natural barrier: Knowles v. Crocker Estate Co., 149 Cal. 278, 86 Pac. 715; but the erection of a common inclosure about a number of fields owned by different parties and pastured by them in common does not destroy their possession: Wylie v. Waddell, 52 Mo. App. 226. The mere entry upon a parcel of real property or constructing, or commencing the construction of, a fence, and the possession gained thereby, must be considered with what we have already said in subdivision V, a, 3, considering the necessity for the possession becoming complete and peaceable: Hays v. Altizer, 24 W. Va. 505. Mere plowing or other cultivation does not necessarily establish possession of the land plowed or cultivated: Edwards v. Cary, 60 Mo. 572; but as neither inclosure nor residence is indispensable to possession, it is evident that it is often manifested and sufficiently established by the cultivation of the land in the ordinary manner, in good faith, and in the usual course of husbandry, and not as a mere pretense: Hussey v. McDermott, 23 Cal. 413; Valencia v. Couch, 32 Cal. 339, 91 Am. Dec. 589; Harris v. Turner, 46 Mo. 438. The land may be of a character, or situate in a part of the country, where its ordinary use does not require either inclosure or cultivation, as where it is used for pasturage, and that use may, therefore, constitute possession: Giddings v. '76 Land & Water Co., 83 Cal. 96, 23 Pac. 196; Keen v. Schweigler, 70 Mo. App. 409; Hopkins v. Calloway, 3 Sneed, 11; Winn v. McKinnon (Tex. Civ. App.), 39 S. W. 965. We have already incidentally suggested, and the law is, that actual residence or personal presence on land is not essential to its possession where such possession is sufficiently manifested by other acts of use and control: Gray v. Collins, 42 Cal. 152; Giddings v. '76 Land & Water Co., 83 Cal. 96, 23 Pac. 196; Hammond v. Doty, 184 Ill. 246, 56 N. E. 371; Bradley v. West, 60 Mo. 59; Jarvis v. Hamilton, 16 Wis. 574. Therefore possession may be maintained by tenants and agents and still be the possession of the principal or landlord, all the acts being, in contemplation of law, done by him and for his benefit: Barnwell v. Stephens, 142 Ala. 609, 38 South. 662; Moore v. Goslin, 5 Cal. 266;

Minturn v. Burr, 16 Cal. 107; *Potts v. Magnes*, 17 Colo. 364, 30 Pac. 58; *Muller v. Balke*, 167 Ill. 150, 47 N. E. 355; *Emsley v. Bennett*, 37 Iowa, 15; *Burdette v. Corgan*, 27 Kan. 275; *Kercheval v. Ambler*, 4 Dana, 166; *Higginbotham v. Higginbotham*, 10 B. Mon. 369; *Coolbaugh v. Porter*, 33 Mo. App. 548. The possession of the plaintiff must be exclusive. At all events, he cannot successfully rely on his possession when it was shared with the defendant: *Barnwell v. Stephens*, 142 Ala. 609, 38 South. 662; *Jamison v. Graham*, 57 Ill. 94; *Gardner v. Hickock*, 102 Mich. 497, 60 N. W. 974. A cotenant turned out of possession is still in law deemed in possession if another cotenant remains in possession, not holding or claiming adversely: *Bernecker v. Miller*, 40 Mo. 473, 93 Am. Dec. 309. Of course, it is not essential that all persons but the plaintiff should be excluded from the land or have their property removed therefrom, provided their being, or having such property, there is in subordination to the occupant's rights, and not as independent claimers or possessors: *House v. Camp*, 32 Ala. 541.

5. **Illustrations of Acts not Sufficient to Constitute Possession.**—In a general sense, it may be said that acts which are not of dominion or control, and notwithstanding which the dominion or control may be in another, or not exist in anyone, do not establish possession. Among these may be mentioned the payment of taxes: *McCartney v. McMullin*, 38 Ill. 237; *Pensoneau v. Bertke*, 82 Ill. 161; *McCartney's Admr. v. Alderson*, 45 Mo. 35; *Miller v. Northrup*, 49 Mo. 397; hitching horses in an unfinished stable: *Blake v. McCrary*, 65 Miss. 443, 4 South. 339; cutting of timber for firewood: *Pensoneau v. Bertke*, 82 Ill. 161; *Wilson v. Stivers*, 4 Dana, 634; *Bell v. Cowan*, 34 Mo. 251; and like occasional acts, even when accompanied with the occasional use of the land for grazing purposes: *Stockley v. Cisna* (Tenn.), 104 S. W. 792; nailing up the doors of a house: *Hopkins v. Buck*, 3 A. K. Marsh. 110; retaining fragments of an old fence, which, when erected, was probably sufficient to constitute possession: *Hassett v. Johnson*, 48 Ill. 68; initiating acts of possession, such as erecting a cabin, deadening trees, cutting brush and erecting part of a fence, but leaving all these acts incomplete, and suspending all further action: *Galligher v. Connell*, 35 Neb. 517, 53 N. W. 383; *Commonwealth v. Lemmon*, Add. (Pa.) 315; taking possession of a house, which is confessedly personal property, because admitted to be on the land of another: *Brooks v. Warren*, 5 Utah, 118, 13 Pac. 175.

6. **Possession of Part as Possession of the Whole.**—One who has a lease or conveyance of property, or some other writing constituting color of title thereto, and who thereunder takes open, visible possession of some definite part, has what may properly be styled a constructive possession extending over the whole, if there is no adverse possessor of any part thereof, and this rule applies to actions of forcible entry and detainer: *O'Callaghan v. Booth*, 6 Cal. 63; *Brooks v. Bruin*, 18 Ill. 539; *Hardisty v. Glenn*, 32 Ill. 62; *Vanhorne v. Tilley*,

1 T. B. Mon. 50; Boyce v. Blake, 2 Dana, 127; Wilson v. Stivers, 4 Dana, 634; Louisville & N. R. Co. v. Sparks, 14 Ky. Law Rep. 398; Kirby v. Scott, 24 Ky. Law Rep. 2175, 73 S. W. 749; Seals v. Williams, 80 Miss. 234, 92 Am. St. Rep. 601, 31 South. 707; Kincaid v. Logue, 7 Mo. 166; Prewitt v. Burnett, 46 Mo. 372; Hosli v. Yokel, 58 Mo. App. 169; Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. Supp. 620; Mansfield v. Northcut, 112 Tenn. 536, 80 S. W. 437; Olinger v. Shepherd, 12 Gratt. 462; Moore v. Douglas, 14 W. Va. 708; Duff v. Good, 24 W. Va. 682. There are a few decisions which, while they do not deny the existence of this rule, appear not wholly consistent with it: Hoskins v. Cox, 2 B. Mon. 306; Roberts' Heirs v. Long, 12 B. Mon. 194; Harris v. Turner, 46 Mo. 438. There is no doubt that, as to a mere trespasser, or one entering on the possession of another without color of title, his possession is restricted to his actual occupancy and does not extend to the balance of the tract entered upon: Kincaid v. Logue, 7 Mo. 166; Kennedy v. Prueitt, 24 Mo. App. 414; and that, though one has color of title, his possession of one portion of a tract cannot be held to extend over another part in the actual adverse possession of another person: Clements v. Hays, 76 Ala. 280; Ross v. Roadhouse, 36 Cal. 580.

7. **Continuance of Possession in the Absence of the Possessor.**—He who once had possession may abandon it, and if he does so, it ceases to exist for his benefit, and his subsequent entry thereon, whether forcible or not, is not an entry on his possession, but the mere going or being away from the property is not necessarily, or even ordinarily, an abandonment of its possession, and is never such if the going away was with intent to return, at least if the absence is not of such length or accompanied with such circumstances that the intention to return must be deemed of itself abandoned: Wilson v. Shackelford, 41 Cal. 630; Leroux v. Murdock, 51 Cal. 541; Giddings v. '76 Land & Water Co., 83 Cal. 96, 23 Pac. 196; Huftalin v. Misner, 70 Ill. 205; Powell v. Davis, 54 Mo. 315; Lewis v. Yoakum (Tex. Civ. App.), 32 S. W. 237; Mitchell v. Carder, 21 W. Va. 277. If real property is in possession of a lessee who leaves it unoccupied at the close of his term, his landlord must be regarded as having resumed such possession: Porter v. Murray (Cal.), 12 Pac. 425; Shelby v. Houston, 38 Cal. 410; Wilson v. Shackelford, 41 Cal. 630; Walser v. Graham, 60 Mo. App. 323; and during the time required for the procuring of a new tenant or other taking of personal possession by the landlord, he is entitled to the same protection and remedy against persons making forcible entries as if he were personally on the premises: Anderson v. Mills, 40 Ark. 192; McCormick v. McDowell, 28 Ky. Law Rep. 854, 90 S. W. 541; Anderson v. Chicago R. I. etc. R. Co. (Mo. App.), 107 S. W. 456. It is never necessary, though property is not used, for the owner or possessor to remain in person on the premises, nor even to see that he has an agent or representative there, for he may maintain control over it in fact or in contemplation

of law, and if he does so, does not subject it, because of his temporary absence, to be entered upon by another with impunity. On the contrary, a person so entering does not thereby become ipso facto in the peaceable possession of the property, so that he can maintain a proceeding in forcible entry if the former possessor without laches returns and expels such intruder: *Stevenson v. Morissey*, 22 Ill. App. 258; *Wilson v. Campbell*, 75 Kan. 159, 88 Pac. 548, 8 L. R. A. 426; *Haley v. Palmer*, 9 Dana, 320; *Bartlett v. Draper*, 23 Mo. 407; *People v. Field*, 52 Barb. 198; *Whittaker v. Perry*, 38 Vt. 107.

b. Force.

1. **Unlawfulness of.**—It has been held, and the weight of authority sustains the holding, that an owner or other person entitled to the possession of real property may enter by force without subjecting himself to any civil liability for so doing either by way of trespass for his injury, or for the damages resulting from an assault or battery committed in entering, if no excessive force is employed: *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442; *Manning v. Brown*, 47 Md. 506; *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Jackson v. Farmer*, 9 Wend. 201; *Smith v. Reeder*, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172; *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364. From this proposition there is a reasonable judicial dissent: *Reeder v. Purdy*, 41 Ill. 279; *Hamilton v. Steuart*, 59 Ill. 330; *Illinois etc. C. Co. v. Cobb*, 68 Ill. 53; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 684; *Dustin v. Cowdry*, 23 Vt. 631. Statutes with respect to forcible entry, however, are practically conceded to introduce and enforce a different rule for the benefit of a person seeking redress under them. If he can show that he was peaceably in possession of the property, then the force, violence, threats and menaces employed to dispossess him or to intimidate him into yielding possession, he is entitled to have treated as unlawful, and to be redressed to the extent of being restored to the possession and to recovering damages or penalty, whenever the statute on which he relies entitles him thereto and provides for such recovery in proceedings prosecuted under it, irrespective of the ownership or right of the person making the forcible entry: *McCauley v. Weller*, 12 Cal. 500; *Evill v. Conwell*, 2 Blackf. 133, 18 Am. Dec. 138; *Hunt v. Hicks*, 3 Ind. Ter. 275, 54 S. W. 818; *Wilson v. Campbell*, 75 Kan. 159, ante, p. 366, 88 Pac. 548, 8 L. R. A., N. S., 426; *Whitney v. Brown*, 75 Kan. 678, 90 Pac. 277; *Smith v. Dedman*, 4 Bibb, 192; *Hunt v. Wilson*, 14 B. Mon. 44; *Beeler v. Cardwell*, 33 Mo. 84; *Wamsganz v. Wolff*, 86 Mo. App. 205; *Tarpenning v. King*, 60 Neb. 213, 82 N. W. 621; N. Y. Code Civ. Proc., sec. 2233; *Davis v. Mayo*, 82 Va. 97; *Gore v. Altice*, 33 Wash. 335, 74 Pac. 556. Force, as the term is here employed, seems to include something more than the mere exercise of such power as may be necessary to effect an entrance and to involve either a breach of the peace or such force, menaces

or attending circumstances as to warrant the apprehension of an assault or personal injury if resistance is made, and therefore it has been held that if one entitled to the possession of premises goes to them when the occupant is absent, and finding the doors or other inclosures locked or otherwise fastened, breaks them open or otherwise overcomes such resistance as they afford, he is not guilty of forcible entry within the meaning of the statute: *Vallauri v. Loftus*, 26 Misc. Rep. 760, 56 N. Y. Supp. 1066; *Smith v. Reeder*, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172; *Mussey v. Scott*, 32 Vt. 82.

2. **Necessity for.**—The terms “forcible entry” of themselves imply that the entry upon which the proceeding may be sustained must be accomplished either by actual force or by such a show of force that the yielding without a struggle cannot be deemed a consent to being deprived of possession, and such is the law: *Botts v. Armstrong*, 8 Port. 57; *McGuire v. Cook*, 13 Ark. 448; *Smith v. Laferry*, 27 Ark. 46; *Hall v. Trucks*, 38 Ark. 257; Cal. Code Civ. Proc., sec. 1159, subd. 1; *Owen v. Doty*, 27 Cal. 502; *Buel v. Frazier*, 38 Cal. 693; *Wilbur v. Cherry*, 39 Cal. 660; *Conroy v. Duane*, 45 Cal. 597; *Goad v. Heckler*, 19 Colo. App. 479, 76 Pac. 542; *Curry v. Hendry*, 46 Ga. 631; *Coker v. McKinney*, 68 Ga. 289; *Lott v. Peterson*, 95 Ga. 516, 20 S. E. 275; *Bloom v. Goodner*, 1 Ill. 63; *Steiner v. Priddy*, 28 Ill. 179; *Doty v. Burdick*, 83 Ill. 473; *Riley v. Catron*, 4 Ind. Ter. 376, 69 S. W. 908; *Barton v. Osborn*, 6 Blackf. 145; *O’Connell v. Gillespie*, 17 Ind. 459; *Archey v. Knight*, 61 Ind. 311; *Cammack v. Macy*, 3 A. K. Marsh. 296; *Woodman v. Ranger*, 30 Me. 180; *Latimer v. Woodward*, 2 Doug. (Mich.) 368; *Richter v. Cordes*, 100 Mich. 278, 58 N. W. 1110; *Sheehy v. Flaherty*, 8 Mont. 365, 20 Pac. 687; *Romero v. Gonzales*, 3 N. Mex. 35, 1 Pac. 171; *Hendrickson v. Hendrickson*, 12 N. J. L. 202; *Hildreth v. Camp*, 41 N. J. L. 306; *Varick v. Jackson*, 2 Wend. 166; *Mullen v. Conyngham*, 56 N. Y. Supp. 196; *Yager v. Wilbur*, 8 Ohio, 398; *Taylor v. Scott*, 10 Or. 483; *Commonwealth v. Keeper of Prison*, 1 Ashm. 140; *Greer v. Wroe*, 1 Sneed, 246; *Brooks v. Warren*, 5 Utah, 118, 13 Pac. 175; *Carter v. Van Dorn*, 26 Wis. 289; except where these terms have been made to yield to statutory definitions eliminating the question of force, or, at least, making the proceeding maintainable under some circumstances where it is clear it has not been employed, nor any apprehension of its employment created. There may be a case in which the entry must be deemed forcible, though force was not employed at the moment of making it. “If the entry be obtained by stealth or stratagem, or without real violence, and the party entering evinces his purpose in having entered to have been the forcible expulsion of the party in possession, and it is followed up by actual expulsion by means of personal threats or violence, or superior force, it will amount to a forcible entry”: *Seitz v. Miles*, 16 Mich. 456.

To some extent we shall refer to statutes eliminating the necessity for force wholly or in specified cases. This elimination has been ac-

accomplished chiefly by statutory definitions in which the actual meaning of the word "force" has been perverted, and entries defined as forcible, though obviously peaceful, as where the statute declares that if any person shall enter upon any lands or other possessions, and detain or hold the same without right or claim of title, he shall be deemed guilty of forcible entry: *Towell v. Etter*, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53. In California, one may be guilty of forcible entry, though such entry was peaceable, if, after his entry, he "turned out by force, threats, or menacing conduct the party in possession": Cal. Code Civ. Proc., sec. 1159, subd. 2; *Giddings v. '76 Land & Water Co.*, 83 Cal. 96, 23 Pac. 196; *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447. In Illinois, the proceeding may be maintained by the person in possession against one who entered on vacant or unoccupied lands without right or title: *Fitzgerald v. Quinn*, 165 Ill. 354, 46 N. E. 287; *Hammond v. Doty*, 184 Ill. 246, 56 N. E. 371. In Kentucky, "a forcible entry is an entry without the consent of the person having the actual possession": *Robinson v. Marshall*, 25 Ky. Law Rep. 1785, 78 S. W. 904; *Check v. Reiter*, 31 Ky. Law Rep. 249, 102 S. W. 287; *Clark v. Langenbach*, 130 Fed. 755, 65 C. C. A. 181. In Massachusetts, the statute provides for three cases, "as where a tenant whose control or right of possession has expired holds possession without right; secondly, where any forcible entry shall have been made; or thirdly, where any entry shall have been made in a peaceable manner, and the possession shall be unlawfully held by force": *Saunders v. Robinson*, 5 Met. 343. Force is not requisite to the maintenance of the action under the statutes of Minnesota: *Davis v. Woodward*, 19 Minn. 174. The statute of Mississippi controlling the subject is similar to that of Kentucky, already referred to: *Seals v. Williams*, 80 Miss. 234, 92 Am. St. Rep. 601, 31 South. 707; *Paden v. Gibbs*, 88 Miss. 274, 40 South. 871. In Missouri, an entry is forcible if made against the will of a person in peaceable possession: *Dennison v. Smith*, 26 Mo. 487; *Wunsch v. Gretel*, 26 Mo. 580; *Oakes v. Aldridge*, 46 Mo. App. 11; *Wylie v. Waddell*, 52 Mo. App. 226. In South Carolina and Tennessee, force appears to be implied in every unlawful entry, and therefore need not be proved in an action of forcible entry otherwise than by proof that the entry was unlawful: *Burt v. State*, 3 Brev. 413; *Cleage v. Hyden*, 6 Heisk. 73.

3. Character of and of the Entry.—The purpose of the entry may be material, however great the degree of force employed. If it is manifestly the committing of a mere trespass or the doing of some other wrongful act, and not the taking possession of the property, the wrongdoer is answerable, but not in an action for forcible entry: *Frazier v. Hanlon*, 5 Cal. 156; *Brawley v. Risdon Iron Works*, 38 Cal. 676; *Castro v. Tewksbury*, 69 Cal. 562, 11 Pac. 339; *Gray v. Finch*, 23 Conn. 495; *Saunders v. Robinson*, 5 Met. 343; *Berry v. Williams*, 21 N. J. L. 423; *Dudley v. Chanfrau*, 2 Edm. Sel. Cas. 128; *People v. Smith*, 24 Barb. 16; *Willard v. Warren*, 17 Wend. 257; *Smith*

v. Reeder, 21 Or. 241, 28 Pac. 890, 15 L. R. A. 172; Temple v. State, 6 Baxt. 496; Foster v. Kelsey, 36 Vt. 199, 84 Am. Dec. 676; Jarvis v. Hamilton, 16 Wis. 574; as where the entry is to cut and carry away grass: Merrill v. Forbes, 23 Cal. 379; or timber: Grugher v. Wheeler, 12 B. Mon. 188; Rouse v. Dean, 9 Mo. 301. This is not because the amount of force employed is inadequate in amount or violence, but because the purpose is not to dispossess the prior occupant, if such there be. We may readily suggest cases attended with the utmost force and violence and with intimidation, and even resort to firearms, and in which a temporary possession is obtained and a temporary expulsion of the parties previously in possession effected which do not constitute forcible entries within the meaning of the law for the same reason, as where a party of men enter into a building for the purpose of robbery, with ample force and an unquestionable intent to use it to whatever degree necessary to accomplish their purpose, and to obtain temporary control, which they accordingly obtain and continue to exercise until their object in entering is attained. Where, on the other hand, the object in entering is to take and retain possession of the property, very different considerations prevail, and the amount of force or intimidation employed may be much less, and still forcible entry consummated. It is quite difficult to formulate any test by which, under all circumstances, to determine whether an entry or detainer is forcible within the meaning of the statutes. Upon the question of the employment and sufficiency of force the following remarks of Judge Sanderson in Valencia v. Couch, 32 Cal. 339, 91 Am. Dec. 589, are quite pertinent and sensible: "Upon the question of force, counsel for defendant seem to assume that the entry was complete the moment defendant and his party put their feet upon the premises; and inasmuch as that was accomplished without knocking anybody down, or threatening to do so, with a show of sufficient force, the entry must be held to have been peaceable. We do not so understand it. The entry of defendant was not complete until he had expelled the plaintiffs and effected an exclusive lodgment, which was not done until he had knocked some boards off the fence with which he had inclosed both the lot and Mrs. Valencia, and let her out with a rap upon her knuckles with his hammer. Until then, he had not obtained an exclusive possession of the premises, and the entry was not complete. Until then, his entry had been contested by Mrs. Valencia, who had protested against his acts in putting up the fence, and had resisted him so far as a woman, opposed by eight men, could be expected to do so. Two hostile parties cannot be in possession of the premises at the same time, and the possession is not changed until the invaders have expelled the former occupants. For the purpose of determining, then, whether the entry in this case was forcible or not, within the meaning of the statute, all that transpired between the coming of the defendant and the going of Mrs. Valencia is to be taken into account. It appears that

Valencia himself left the premises about the time the defendant and his party came. It is true he says on cross-examination he did not leave because he was afraid, but having business somewhere else, he left. Mrs. Valencia, however, remained, so the defendant did not find the place unoccupied. He came attended by six or seven other men. That all did not come for the purpose of building a fence is manifest from the fact that the number was unusually large for that purpose, and the further and significant fact that only two or three of them engaged in that business, while the others seemed to play the part of a body-guard. True, some of them appeared to be men of 'infinite jest,' who found food for fun in the tears and remonstrances of a woman; but others were not void of sterner stuff, for when it became necessary to remove the person of Mrs. Valencia from the line of fence which they were building, smiles and jests gave place to passion and force. When she took hold of the fencing materials for the purpose of preventing their use, as she lawfully might do, they laid violent hands upon her and forcibly removed her. It is true that when, notwithstanding her remonstrances and resistance, the defendant and his party had succeeded in inclosing the lot and Mrs. Valencia with a fence, and she had determined to abandon the contest and withdraw from the field, the defendant knocked off two or three boards to afford her a place of exist. This cannot be accepted, however, as an act of gallantry, notwithstanding it is claimed as such by counsel for defendant, especially when we find it accompanied by a rap upon her knuckles with his hammer. Having been given with a hammer, and with force sufficient to leave a wound, the law cannot regard the blow as playful, though it may have been accompanied by the bow of a Grandison or the smile of a Chesterfield. A blow is no less a blow because it is dealt with a smile or pointed with a jest.''

Entry on property, accompanied by several other persons and assuming possession of it, though without any other show of force and without any express menace, may unquestionably be sufficient evidence of a forcible entry: *Knowles v. Crocker Estate Co.*, 149 Cal. 278, 86 Pac. 715; *Potts v. Magnes*, 17 Colo. 364, 30 Pac. 58; especially where attended with the pulling down of pre-existing fences: *Minor v. Duncan*, 54 Ga. 516; *Parrott v. Hodgson*, 46 Ill. App. 230; or the construction of new fences and the building of a house: *Watson v. Whitney*, 23 Cal. 375; *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168. Like effect may justly be attributed to taking possession of a house, putting in a tenant, with directions to him to prevent every person, and especially the former occupant, from taking possession, and threatening to beat and prosecute any person who enters: *Evill v. Conwell*, 2 Blackf. 133, 18 Am. Dec. 138. "Hawkins says: 'A forcible entry ought to be accompanied with some circumstances of actual violence or terror': *Hawk.* 36, b. 1, c. 64, sec. 25. And again: 'The behavior or speech at the time of the entry must be such as to give

just cause of fear or bodily hurt. The speeches must be such as imply a purpose of using force against those who shall make any resistance, as if one say that he will keep possession in spite of all men': Id., sec. 27. 'A threat to spoil another's goods or to destroy his cattle, or do him any other such harm, which is not personal, is not sufficient': Id., sec. 28. And again: 'A man ought not to be adjudged guilty of a forcible detainer for barely refusing to go out of an house and continuing therein in spite of another': Id., sec. 30. Hawkins draws his doctrines from Lambard and Dalton and the ancient cases, and is himself followed by the late authors. Coke points out the distinction between a force implied in every trespass and disseisin, and an actual force, as with weapons, numbers of persons, etc., and says an entry with such actual force is requisite: Co. Lit. 257, b. Comyns says: 'It shall not be a forcible entry if, after entry, he cuts corn, grass, etc.': Com. Dig., tit. Forc. Ent., A. 3. Bacon says: 'A forcible entry must be with strong hand, with unusual weapons, or with menace of life or limb.' The term 'strong hand' is thus explained by Ryder, C. J., in *Rex v. Bathurst*, Say. 225: 'The words manu forti are understood to import something criminal in its nature, something more than is meant by the words vi et armis.' And Rolle had previously said (Styles, 135): 'These words distinguish this kind of entry from an ordinary trespass by entering into another's land, which is not so violent as a forcible entry is supposed to be.' The like doctrine was repeated by the court in *The King v. Wilson*, 8 Term Rep. 361. In *Rex v. Starr*, 3 Burr. 1698, an indictment for unlawfully entering a yard and digging the ground and erecting a shed, and unlawfully and with force putting out the owner from the possession and keeping him out, was quashed, the facts charged not amounting to a forcible entry and detainer. A distinction was recognized between the entry into a dwelling-house, and putting the tenant out of possession, as in *Rex v. Bathurst*, and the entry into an uninhabited inclosure. In *Rex v. Bake and others*, Id. 1731, an indictment against sixteen persons for forcible entry in breaking and entering with force and arms, a close, not a dwelling-house, and unlawfully and unjustly expelling the prosecutors and keeping them out of possession, was quashed, on motion, for not showing sufficient actual force, violence, unlawful assembly, riot, or other circumstances.

'The same doctrine is maintained in the American cases. In *Pennsylvania v. Robinson*, Add. 14, it was held that there must be at least such acts of violence, or such threats, menaces, or gestures as may give a man reason to apprehend personal injury or danger in standing in defense of his possession. In *Pennsylvania v. Waddle*, Add. 41, the court directed the jury, that if the meaning and tendency of the words used by the defendant were to impress on the complainant a terror of personal harm, if he should proceed to take possession, it was force, but if their meaning was only to signify that he would not give up his claim, which he thought a just one, until

by legal trial it was declared unjust, this was not force. In *Commonwealth v. Dudley*, 10 Mass. 403, it was held that 'there must be some apparent violence offered in deed or in word to the person of another, or the party must be furnished with unusual offensive weapons, or attended by an unusual multitude of people, all of which circumstances would tend to excite terror in the owner, and prevent him from claiming or maintaining his rights'": *Butts v. Voorhees*, 13 N. J. L. 13, 22 Am. Dec. 489.

Acts tending to breaches of the peace are generally sufficient: *Turner v. Lumbrick*, 1 Meigs, 7. Sometimes acts of this character have been said to be necessary: *Harrington v. Scott*, 1 Mich. 17; but doubtless there may be acts of force and violence which do not amount to breaches of the peace, and yet sufficiently indicate a forcible entry: *Smith v. Hoag*, 45 Ill. 250; though they do not excite fear of personal danger: *Berry v. Williams*, 21 N. J. L. 423.

There is no necessity that the force offered, or intended to be offered, if necessary, should be resisted, if the failure to resist it is due to intimidation or well-founded belief that the resistance will be useless. "The law does not require a vain thing to be done, and in the case of an entry made where the parties show by force and immoderate language their intention to hold the property, no actual collision would be required": *Ladd v. Dubroca*, 45 Ala. 421; *O'Callaghan v. Booth*, 6 Cal. 63; *Hunt v. Hicks*, 3 Ind. Ter. 275, 54 S. W. 818; *Harrow v. Baker*, 2 G. Greene, 201; *Benedict v. Hart*, 1 Cush. 487; *O'Donnell v. McIntyre*, 16 Abb. N. C. 84. The requisite intimidation does not necessarily consist of force or violence to the occupant or the employment of physical force either against him or the property. It is sufficient that it be of some other harm or injury to him, as a threat that if he does not surrender possession within a specified time he will be arrested: *Wells v. Darby*, 13 Mont. 504, 34 Pac. 1092. On the other hand, it is said that the menace employed to intimidate must be such as might reasonably have that effect: *Archev v. Knight*, 61 Ind. 311; *Tischler v. Knick*, 57 N. Y. Supp. 3. Procuring the arrest of the occupant without a warrant and taking possession in his absence and while he is in custody, and then taking forcible possession of and removing his goods sustains the action of forcible entry: *Pratt v. Stone*, 10 Ill. App. 633; *Tibbetts v. O'Connell*, 66 Ind. 171.

The entering upon property and constructing fences about it or the tearing down of fences previously maintained, apparently for the purpose of exercising the dominion of an owner: *Mallon v. Moog*, 121 Ala. 303, 25 South. 583; *Brown v. French*, 148 Ala. 272, 42 South. 409; *Coverdale v. Curry*, 48 Ill. App. 213; *Stith v. Jones*, 7 Dana, 434; *Meriwether v. Howe*, 48 Mo. App. 148; *Gass v. Newman*, 1 Head, 136; *Steinlein v. Halsted*, 42 Wis. 422; the forcing of doors and taking keys from the prior occupant: *McCauley v. Weller*, 12 Cal. 500; the knocking off of boards nailed across doors: *Lissner v. State*,

84 Ga. 669, 20 Am. St. Rep. 389, 11 S. E. 500; the forcing of the lock of a church to hold services therein: *Central Park B. Church v. Patterson*, 9 Misc. Rep. 452, 30 N. Y. Supp. 248; the breaking of the doors and windows of a building to gain possession thereof: *Davidson v. Phillips*, 9 Yerg. 93, 30 Am. Dec. 393; *Mussey v. Scott*, 32 Vt. 82; *Ainsworth v. Barry*, 35 Wis. 136—have all been regarded, and we think properly, as sufficient evidence of forcible entries. The entering of a house by the aid of false keys makes the person so entering guilty of a forcible detainer, under a statute providing that every person is so guilty of a forcible detainer, who “by breaking open doors, windows, or other parts of a house, enters upon or in any real property”: *Winchester v. Becker*, 4 Cal. App. 382, 88 Pac. 295. A forcible entry is not complete until the occupant is expelled: *Valencia v. Couch*, 32 Cal. 339, 91 Am. Dec. 589; *Hoffman v. Harrington*, 22 Mich. 52. Therefore, the force requisite to support the proceeding may be employed at any stage of the transaction up to and including the actual expulsion or surrendering of possession, and the action is not defeated by showing that at some stage no force was employed for the force, whenever or wherever employed, gives character to the whole. Therefore, if there were two blocks of land within the same inclosure, and the violence or force not employed with respect to one, still both may be recovered by the proceeding, if the entry effected as to the other block was aimed at and for the purpose of procuring possession of both blocks: *Pharis v. Gere*, 110 N. Y. 335, 18 N. E. 135, 1 L. R. A. 270.

Among the acts which have been held insufficient to support the allegation of a forcible entry may be mentioned the removal of a fence: *McGonegal v. Walker*, 23 Ala. 361; the opening of a gate and thereby entering the premises: *Fowler v. Prichard*, 148 Ala. 261, 41 South. 667; the building of a house upon part of a tract: *Thompson v. Smith*, 28 Cal. 527; placing property on a lot and the sidewalk in front thereof: *Brawley v. Risdon Iron Works*, 38 Cal. 676; entering upon unworked mining ground, though there was a subsequent refusal to deliver possession upon demand: *Laird v. Waterford*, 50 Cal. 315; *Coker v. McKinney*, 68 Ga. 289; entering premises by the use of keys: *Livingston v. Webster*, 26 Fla. 325, 8 South. 442; refusing to desist from causing rails to be split and a fence to be erected: *Stuckey v. Carleton*, 66 Ga. 215; or from closing a church and afterward locking the gate and posting notices forbidding all persons from trespassing on the premises: *Lott v. Peterson*, 95 Ga. 516, 20 S. E. 275; taking possession of property after the termination of a lease, the tenant having previously consented that such possession be taken: *Robinson v. Marshall*, 25 Ky. Law Rep. 1785, 78 S. W. 904; going with a workman to an empty tenement, demanding the key to a padlock with which the door was fastened, and, being refused, ordering the workman to enter through an opening in the floor, and, after entering, using an ax to remove the padlock: *Pike*

v. Witt, 104 Mass. 595; entering a house to make repairs, receiving a key therefor, though in entering it was necessary to overcome some obstacles placed there by the plaintiff: Seifert v. Withington, 63 Mo. 577; entering in the absence of the occupant, cutting timber, building a small cabin, fastening the door, and then leaving the premises: Pauley v. Chapman, 2 Rob. (Va.) 235; and going to and entering on land, erecting a small cabin and slaughter-house, removing part of the fences, and two or three days afterward, when the former occupant went to retake possession, announcing the purpose to do so if not forcibly resisted, he saying that he did not wish to be shot, answering that any attempt to take possession by force would be resisted: McMinn v. Bliss, 31 Cal. 122. Doubtless, some of these decisions are in conflict with others that have been cited on the same subject and probably with the weight of authority upon it. In Georgia, where the prosecution is criminal and is for a forcible entry and detainer, force, both in the entry and detainer, must be proved: Lewis v. State, 99 Ga. 692, 59 Am. St. Rep. 225, 26 S. E. 496; and even when the proceeding is in the nature of a civil action, "to make the entry forcible, there must be such acts of violence used, or such threats, menaces or gestures exhibited, as give reason to apprehend personal injury or danger in standing in the defense of the possession": Griffin v. Griffin, 116 Ga. 754, 42 S. E. 1005.

As possession is not peaceable until the former occupant is expelled and practically abandons the struggle for possession, and as an entry may be commenced and sometimes consummated before the occupant is aware that it will be attempted, it is somewhat difficult to state the force necessary to be exercised in such cases and the time when it must be employed. On the one hand it is said that a quiet and peaceable entry cannot be converted into forcible entry by subsequent acts of force: Tischler v. Knick, 57 N. Y. Supp. 3; and on the other, are many cases which we are unable to reconcile with this view. Our conclusion is, that however peaceable the entry may be, yet if it takes place in the absence and without the knowledge of the prior occupant, and upon his coming upon the scene, force or intimidation is then employed sufficient to overcome any resistance he may then offer, or to prevent him from offering resistance or attempting to regain possession, such latter exhibition of force or intimidation gives color to the whole transaction and requires the entry to be regarded as forcible, if the force employed or the intimidation used would have been sufficient had they been employed in first effecting an entry: Ely v. Yore, 71 Cal. 130, 11 Pac. 868; Phelps v. Randolph, 147 Ill. 335, 35 N. E. 243; Seitz v. Miles, 16 Mich. 456; Fowler v. Ohnick (Wash.), 87 Pac. 1050.

4. **Where the Proceeding is Based Only on the Detainer.**—We shall now give some consideration to those cases in which the real gravamen of the action was not force or violence in the entry, but was the detainer of the property, whether the entry was forcible or not.

These cases may be presented under two classes of statutes; first, those making definitions of forcible entries without requiring in them any element of force; and second, those expressly purporting to authorize the maintenance of the proceeding where the entry was not forcible. At an early date in Alabama, it was said that possession lawfully acquired may be converted into a forcible detainer by refusal to yield the premises on demand and forcibly detaining them: *Wright v. Lyle*, 4 Ala. 112. This dictum was afterward questioned in the same state, as it deserved to be, unless sustained by some statute: *Matlock v. Thompson*, 18 Ala. 600. The code of the state was, however, amended to make forcible entry and detainer consist of "entering peaceably and then by unlawful refusal keeping the party out of possession." Under this statute, the unlawful refusal might be established by inquiring of the person entering, whether he intended to give up the premises, and his response that he had entered the land of the government, and intended to hold it if he could: *Welden v. Schlosser*, 74 Ala. 355. By a further amendment, the same general idea was expressed by declaring that a forcible entry and detainer may consist of a peaceable entry, "and then by an unlawful refusal or by force or threats, turning or keeping the party out of possession": *Knowles v. Ogletree*, 96 Ala. 555, 12 South. 397; *Sprouse v. Story*, 144 Ala. 542, 42 South. 23; *Lorah v. Emerson* (Ala.), 45 South. 228. This amendment, it has been held, did not convert the action into one involving title. Under and "in the absence of all force either in entering or keeping possession, two facts must exist in order to support the action: First, there must have been a peaceable intrusion upon a prior actual possession; second, there must have been a demand for possession, and an unlawful refusal thereof. It is not essential that the demand for possession should be in writing, or that it should be in express or positive terms. It is a question of fact to be determined by the justice (or by the jury on appeal) from all the evidence, whether there has been a demand or the equivalent thereof. It may be inferred from the acts and declarations of the parties as well as shown by direct testimony": *Knowles v. Ogletree*, 96 Ala. 555, 12 South. 397.

The early statutes of California, though somewhat ambiguous, were construed as authorizing the proceeding "in the following cases: 1. When the entry is forcible; 2. When the entry is simply unlawful and the detainer forcible; 3. When the entry was lawful and the holding over forcible": *Dickinson v. Maguire*, 9 Cal. 46. By a later statute, that of 1866, forcible detainer was recognized as a distinct cause of action, and declared to exist "if any person shall by force or with a strong hand, or by menaces and force or violence, unlawfully hold and keep the possession of any lands or tenements, whether the same were acquired peaceably or otherwise," and such person was made subject to the same proceedings as in the act provided for in the case of a forcible entry. Like effect was attributed by a sub-

sequent section of the statute to any person who unlawfully entered in the night-time or during the absence of the occupant, and after demand made for the surrender of the possession, for five days refused to surrender them to the former occupant: California Stats. 1896, p. 768; *Shelby v. Houston*, 38 Cal. 410; *Treat v. Forsyth*, 40 Cal. 484. This statute was substantially incorporated in the Code of Civil Procedure of the state: Cal. Code Civ. Proc., sec. 1160; *Brawley v. Bisdon Iron Works*, 38 Cal. 676; *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447; *Lasserot v. Gamble (Cal.)*, 46 Pac. 917. The unlawful entry referred to under the statute was said to be "a peaceable entry made in good faith—that is to say, without any bona fide claim or color of legal right to enter, and not a peaceable entry made in good faith, although wrongful; that is to say, in the belief that there is a legal right to enter": *Shelby v. Houston*, 38 Cal. 410; *Townsend v. Little*, 45 Cal. 673; but the code made all entries on the actual possession of another unlawful, and hence eliminated the question of good faith in the entry: *Voll v. Hollis*, 60 Cal. 569; *Bank of California v. Taaffe*, 76 Cal. 626, 18 Pac. 781; *Giddings v. '76 Land & Water Co.*, 83 Cal. 96, 23 Pac. 196. As to the force or menace required to support the proceeding in forcible detainer, we apprehend that it must be the same in character and degree as to support an action for forcible entry, except that it is ordinarily employed rather to intimidate, and thereby prevent an attempt at re-entry, than in the actual resistance of such attempt. Hence, if after an entry is made, the former occupant or his agent comes to the property, and finding thereon the new occupant or his agent standing at a window with a pistol in his hand and giving the warning not to come around there, a forcible detainer is made out, though it appears at the trial that the pistol was not loaded or even put together, if the person representing the former occupant believed he would be shot at if he attempted to enter, and for that reason desisted from such attempt: *Bank of California v. Taaffe*, 76 Cal. 626, 18 Pac. 781; *Vanhood v. Story*, 4 Humph. 59. If one has the peaceable possession of property and it is entered upon by another, and the first possessor regains possession, he is not obliged to surrender such possession on demand, and is not guilty of a forcible detainer because he refused to do so. If this construction of the statute were correct, "it would result that if one be peaceably but unlawfully in possession of another's dwelling-house, and if the true owner, in the absence of the occupant, peacefully and without violence or threats, regains possession of his own property, then the refusing the intruder to re-enter, he would be guilty of forcible entry under subdivision 2 of section 1159, and of forcible detainer under the first subdivision of section 1160. But the statute was not intended to apply to such a case": *Potter v. Mercer*, 53 Cal. 667; *Bliss v. Johnson*, 73 N. Y. 529, 94 N. Y. 235; *O'Donnell v. McIntyre*, 2 N. Y. St. Rep. 689.

In Georgia, under section 4808 of the Civil Code, authorizing proceedings to eject intruders, the good faith of the party entering is material, and, if established, relieves him from the proceeding. The question is not, does he have the right, but does he in good faith claim it: *Poulan v. Sellers*, 20 Ga. 228; *McHahn v. Stansell*, 39 Ga. 197; *Nicholas v. Chandler*, 46 Ga. 479; *Pratt v. Fountain*, 73 Ga. 261; *Thorpe v. Atwood*, 100 Ga. 597, 28 S. E. 287; *Coffey v. Pace*, 106 Ga. 293, 32 S. E. 115; *Lane v. Williams*, 114 Ga. 124, 39 S. E. 919. The resistance necessary to make the detainer unlawful may consist of a declaration that the persons in possession will not yield possession except to the sheriff, and if anyone else gets possession it will be over their dead bodies: *Brown v. McJunkin*, 99 Ga. 91, 24 S. E. 855. In this state, if the owner can get possession of his land without a breach of the peace, he may lawfully do so, and maintain such possession against any prior possessor who was merely an intruder: *Clower v. Maynard*, 112 Ga. 340, 37 S. E. 370. In Illinois, as we have shown, forcibly entry is not required in certain cases, but only that it be against the will of the occupant: *Roberts v. McEwen*, 81 Ill. App. 413; *Cross v. Campbell*, 89 Ill. App. 489. In Kansas, Kentucky, Maine, Massachusetts, Minnesota, Missouri, and Nebraska, the proceeding may be maintained without there being force in the entry, and in truth, the question of force is generally eliminated: *Campbell v. Coonradt*, 22 Kan. 704; *Campbell v. Miracle*, 29 Ky. Law Rep. 746, 96 S. W. 452; *Clapp v. Paine*, 18 Me. 264; *Mitchell v. Shanley*, 15 Gray, 319; *Warren v. Ritter*, 11 Mo. 354; *Wunsch v. Gretel*, 26 Mo. 580; *Estabrook v. Hateroth*, 22 Neb. 281, 34 N. W. 634; *Post v. Bohner*, 23 Neb. 257, 36 N. W. 508; *Blachford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101.

In Michigan, a forcible detainer after a peaceable entry is not forbidden, unless the entry was unlawful: *Hoffman v. Harrington*, 22 Mich. 52; *Davis v. Woodward*, 19 Minn. 174; and a person so effecting a peaceable entry may resist force in attempting to remove him: *Richter v. Cordes*, 100 Mich. 278, 58 N. W. 1110. One coming rightfully into the possession of property under a lease is not, on the ground that his lease has expired, guilty of a forcible detainer because, in response to a demand for possession, he answers that he will not go out until put out: *Appleton v. Buskirk*, 67 Mich. 407, 34 N. W. 708.

A statute of Oklahoma provided that any justice within his proper county had power to inquire "as well against those who made an unlawful and forcible entry on lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into lands or tenements, unlawfully and by force hold the same," etc. The court, however, held that one who is placed in possession of land without force and violence by a mandatory injunction was not, on its dissolution, removable under the act, if he had been finally awarded the lands by the land department, because under such decision his

possession became lawful: *Frantz v. Saylor*, 12 Okla. 282, 71 Pac. 217.

Under the laws of South Dakota making a forcible entry and detainer proceeding maintainable "where a party has by force, intimidation, fraud or stealth entered upon prior actual possession of real property of another and detains the same," the defense may be made that the entry was in good faith under a purchase from an actual occupant: *Torrey v. Berke*, 11 S. Dak. 155, 76 N. W. 302.

The statutes of Vermont, while they purport to provide for forcible entries only, are in spirit and reason equally applicable to peaceable entries followed by forcible detainers, and the acts of a person peaceably entering upon the possession of a prior occupant and forcibly preventing him from putting his cattle into a field and thus compelling him to quit the premises, are admissible to show a forcible detainer: *Foster v. Kelsey*, 36 Vt. 199, 84 Am. Dec. 676.

A forcible detainer under the statutes of Washington involves: "(1) an entry during the absence of the occupant; (2) a demand for surrender by the party dispossessed; and (3) a refusal for three days to surrender to the former occupant." Under this and similar statutes, if it is a tenant who was in possession and upon whose possession the unlawful entry is made, he is not entitled to maintain the proceeding for a forcible or unlawful detainer: *Chezum v. Campbell*, 42 Wash. 560, 85 Pac. 85.

c. Notice and Demand for Possession.

1. **When Necessary.**—Forcible entry is, in its natural import, an adverse proceeding in which there can be no claim that the possession initiating it could be taken in ignorance of the claims of the person upon whose possession the forcible entry was made, and hence there can be no more reason for exacting a demand or notice before resorting to the proceeding to recover possession than there is for a like preliminary to authorize an action to recover for any other tort or trespass. It may be safely assumed, unless some statute can be found expressly requiring it, that no demand or notice need be made to support an action or proceeding for a forcible entry: *Knowles v. Ogletree*, 96 Ala. 555, 12 South. 397; *Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326; *Farncomb v. Stern*, 18 Colo. 379, 32 Pac. 612; *Stillman v. Palis*, 134 Ill. 532, 25 N. E. 786; *Thomasson v. Wilson*, 46 Ill. App. 398; *McGrath v. Miller*, 61 Ill. App. 497; *Goodlet v. Cleveland*, 12 B. Mon. 430; *Rabe v. Fyler*, 10 Smedes & M. 440, 48 Am. Dec. 763; *Crane v. Dod*, 2 N. J. L. 320; *Smith v. Reeder*, 21 Or. 541, 28 Pac. 890, 15 L. B. A. 172; *Spillman v. Walt*, 12 Heisk. 574; *Mallory v. Hanuar Oil Works*, 86 Tenn. 598, 8 S. W. 396; *Beauchamp v. Runnels* (Tex. Civ. App.), 79 S. W. 1105; *Warren v. Kelly*, 17 Tex. 544; *Foster v. Kelsey*, 36 Vt. 199, 84 Am. Dec. 676; *Allen v. Paul*, 24 Gratt. 332; *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123. In a few of the states a demand for possession seems to be required though the entry of the defendant was forcible: *Nason v. Best*, 17 Kan. 408;

Stuttler v. Sparks, 51 Kan. 19, 31 Pac. 301; Oklahoma City v. Hill, 4 Okl. 521, 41 Pac. 568; Smith v. Finger, 15 Okl. 120, 79 Pac. 579. Where the proceeding is for a forcible or unlawful detainer, the fact that the defendant has failed to surrender possession after a demand is very generally a part of the offense, or, in other words, of the gist of the action, and therefore a demand for possession must be established, especially if the original entry was peaceable: Knowles v. Ogletree, 96 Ala. 555, 12 South. 397; Farley v. Bay Shell Road Co., 125 Ala. 184, 27 South. 770; Brawley v. Risdon Iron Works, 38 Cal. 676; Tivenen v. Monahan, 76 Cal. 131, 18 Pac. 316.

2. **By and to Whom may be Given.**—We apprehend that what we have said on this subject in our note to Washington v. Moore, 120 Am. St. Rep. 45, 46, is equally to demands for possession when required in actions for forcible entry and detainer with respect to the persons who may give the demand: Carico v. Kling, 11 Colo. App. 349, 53 Pac. 390; Smith v. Soper, 12 Colo. App. 264, 55 Pac. 195; Nason v. Best, 17 Kan. 408; Conaway v. Gore, 22 Kan. 216; Voigt v. Avery, 14 Mo. App. 48; Hyde v. Goldsby, 25 Mo. App. 29; Drehman v. Stifel, 41 Mo. 184, 97 Am. Dec. 268; Post v. Bohner, 23 Neb. 257, 36 N. W. 508; Oklahoma City v. Hill, 4 Okl. 521, 46 Pac. 568; Burns v. Noell, 12 Okl. 133, 69 Pac. 1076; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; the person on whom it should be served, and the mode and proof of service: Brawley v. Risdon Iron Works, 38 Cal. 676; Doss v. Craig, 1 Colo. 177; White v. Bailey, 14 Conn. 271; Wheelan v. Fish, 2 Ill. App. 447; Eldridge v. Holway, 18 Ill. 446; Ball v. Peck, 43 Ill. 482; Vennum v. Vennum, 56 Ill. 430; Nason v. Best, 17 Kan. 408; Stuller v. Sparks, 51 Kan. 19, 31 Pac. 301; Peddicord v. Berk, 74 Kan. 236, 86 Pac. 465; Hyde v. Goldsby, 25 Mo. App. 29; Morris C. & B. Co. v. Mitchell, 31 N. J. L. 99; Richardson v. Penny, 6 Okl. 328, 50 Pac. 231; Burns v. Noell, 12 Okl. 133, 69 Pac. 1076; Greenamayer v. Coat, 12 Okl. 452, 72 Pac. 377.

3. **Time to be Given.**—Unless some statute undertakes to specify the time when the demand must be made, or the number of days' notice which the occupant must have before the action can be commenced against him, or before he will be deemed guilty of a forcible detainer, it is sufficient that the demand was made at any reasonable time before the proceeding was begun: Meham v. McKay, 37 Cal. 154; Doss v. Craig, 1 Colo. 177; Lehman v. Whittington, 8 Ill. App. 374; Huftalin v. Misner, 70 Ill. 205. Some of the statutes, however, specify the time when the notice must be served, or, at least, that it must be served a specified time before the commencement of the action: Douglass v. Whitaker, 32 Kan. 381, 4 Pac. 824; Stuller v. Sparks, 51 Kan. 19, 31 Pac. 301; Burns v. Noell, 12 Okl. 133, 69 Pac. 1076. The giving of too much time, as where the notice is received thirty days before the commencement of the proceeding, when the statute exacts three days only, is immaterial: Shuver v. Klinkenberg, 67 Iowa, 544, 25 N. W. 770; but it is said that if the statute

requires the notice to specify that the action is about to be begun, a suit instituted one year afterward is not maintainable: *Douglass v. Whitaker*, 32 Kan. 381, 4 Pac. 874.

4. **Form of the Notice or Demand.**—Some of the statutes require the notice to be in writing: *Lehman v. Whittington*, 8 Ill. App. 374; *Nason v. Best*, 17 Kan. 408; *Hyde v. Goldsby*, 25 Mo. App. 29. In the absence of such requirement, the notice may be oral as well as written: *Knowles v. Ogletree*, 96 Ala. 555, 12 South. 397. Unless some statutory form is prescribed, no special form is indispensable, and every demand must be sufficient from which the person to whom it is given must understand, if of common understanding, what is demanded of him and by whom: *Farr v. Farr*, 21 Ark. 573; *Gardner v. Eberhart*, 82 Ill. 316; *Conaway v. Gore*, 22 Kan. 216; *Best v. Frazier*, 16 Okl. 523, 85 Pac. 1119. The property should be described, but, as in other writings, any description will suffice from which the property intended to be demanded can be identified with certainty: *Farr v. Farr*, 21 Ark. 573; *Grant v. Marshall*, 12 Neb. 488, 11 N. W. 743; *Cummings v. Winters*, 19 Neb. 719, 28 N. W. 302; *Seeley v. Adamson*, 1 Okl. 78, 26 Pac. 1069.

VI. Defenses.

a. **The Denial of any Essential Matter Alleged in the Complaint.**—It has been held that matter in abatement is not pleadable in an action of forcible entry: *Jones v. Overton*, 4 Bibb. 334. The defendant may present both negative and affirmative defenses. By this we mean he may deny, and offer evidence to disprove, any matter alleged by the plaintiff and which is necessary to support a recovery by him, and hence may show that the entry of the defendant was peaceful and not attended with any violence: *Walters v. Rogers*, 9 Ala. 834; *Brooke v. O'Boyle*, 27 Ill. App. 384; *Farmer v. Hunter*, 45 Mich. 337, 7 N. W. 904; *Benjamin v. Reach*, 65 Miss. 347, 3 South. 657; *Reed v. Bell*, 26 Mo. 216; *Hokpkins v. Calloway*, 3 Sneed, 11; *Bird v. Fannon*, 3 Head, 12; *Foster v. Kelsey*, 36 Vt. 199, 84 Am. Dec. 676; *Ferrell v. Lamar*, 1 Wis. 8; that he did not take possession of the property sued for or did not detain it at the commencement of the proceeding: *Preston v. Davis*, 112 Ill. App. 636; *Gill v. Jones*, 57 Miss. 367; that the plaintiff was never in possession of the property sued for, or, if so, that he has abandoned the possession: *Dudley v. Lee*, 39 Ill. 339. But the abandonment of possession by the plaintiff cannot constitute any defense if, before the forcible entry, he had resumed such possession: *Keyser v. Rawlings*, 22 Mo. 126. The abandonment by plaintiff after the defendant's entry is not a defense: *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395. The absence of a refusal on the part of the defendant to deliver possession cannot constitute a defense if, as a matter of fact, after demand, he continues to hold possession of the property: *Floyd v. Ricks*, 11 Ark. 451.

b. Affirmative Defenses.

1. Title or Right to Possession.—We believe the rule to be without exception that in proceedings for forcible entry and detainer title cannot be drawn directly into question, and, considered as a defense, is always immaterial. The plaintiff need not establish any title on his part, and the defendant will not be permitted to prove as a defense that, though his entry was forcible, he was the owner of the property, and therefore was and is entitled to be in possession thereof: *Townsend v. Van Aspen*, 38 Ala. 572; *Milner v. Wilson*, 45 Ala. 478; *Espalla v. Gottschalk*, 95 Ala. 254, 10 South. 755; *O'Donohue v. Holmes*, 107 Ala. 489, 18 South. 263; *Mallon v. Moog*, 121 Ala. 303, 25 South. 583; *Moye v. Thurber*, 146 Ala. 180, 40 South. 822; *Brown v. French*, 148 Ala. 272, 42 South. 409; *Logan v. Lee*, 53 Ark. 94, 12 S. W. 422; *Towell v. Etter*, 69 Ark. 34, 59 S. W. 1096; *Washington v. Moore*, 84 Ark. 220, 120 Am. St. Rep. 29, 105 S. W. 253; *Sanchez v. Loureyro*, 46 Cal. 461; *Baker v. Dickson*, 62 Cal. 19; *Bank of California v. Taaffe*, 76 Cal. 626, 18 Pac. 781; *Felton v. Millard*, 81 Cal. 540, 22 Pac. 750; *Lasserot v. Gamble (Cal.)*, 46 Pac. 917; *Montijo v. Shere (Cal. App.)*, 92 Pac. 512; *Smith v. Soper*, 12 Colo. App. 264, 55 Pac. 195; *Potts v. Magnes*, 17 Colo. 364, 30 Pac. 58; *Dutton v. Tracy*, 4 Conn. 79; *White v. Bailey*, 14 Conn. 271; *Kelley v. Andrew*, 3 Colo. App. 122, 32 Pac. 175; *Carico v. Kling*, 11 Colo. App. 349, 53 Pac. 390; *Murry v. Burris*, 6 Dak. 170, 42 N. W. 25; *Walls v. Endel*, 17 Fla. 478; *Greeley v. Spratt*, 19 Fla. 644; *Slate v. Eisenmeyer*, 94 Ill. 96; *Shoudy v. School Directors*, 32 Ill. 290; *Smith v. Hollenback*, 51 Ill. 223; *Allen v. Tobia*, 77 Ill. 169; *Kenley v. Luke*, 106 Ill. 395; *Thomasson v. Wilson*, 146 Ill. 384, 31 N. E. 432; *Roby v. Calumet etc. D. Co.*, 211 Ill. 173, 71 N. E. 822; *Pederson v. Cline*, 27 Ill. App. 249; *Frank v. Palmer*, 65 Ill. App. 124; *Roberts v. McEwen*, 81 Ill. App. 413; *McDaniel v. School Directors*, 125 Ill. App. 332; *Ross v. Youngman*, 125 Ill. App. 494; *Merki v. Merki*, 212 Ill. 121, 72 N. E. 9; *Folsom v. Hunter*, 6 Ind. Ter. 453, 98 S. W. 156; *Stephens v. McCloy*, 36 Iowa, 659; *Kercheval v. Ambler*, 4 Dana, 166; *Taylor v. White*, 1 T. B. Mon. 37; *Mattox v. Helm*, 5 Litt. 186; *Tucker v. Phillips*, 2 Met. (Ky.) 416; *Robinson v. Marshall*, 25 Ky. Law Rep. 1785, 78 S. W. 904; *McCormick v. McDowell*, 28 Ky. Law Rep. 854, 90 S. W. 541; *Engle v. Tennis C. Co.*, 30 Ky. Law Rep. 1269, 101 S. W. 369; *Hendrickson v. Linville*, 31 Ky. Law Rep. 967, 104 S. W. 688; *Casey v. King*, 98 Mass. 503; *Page v. Dwight*, 179 Mass. 29, 48 N. E. 850, 39 L. R. A. 418; *Hill v. Olin*, 82 Mich. 643, 46 N. W. 1038; *Loring v. Willis*, 4 How. (Miss.) 383; *Lobdell v. Mason*, 71 Miss. 937, 15 South. 44; *Beeler v. Cardwell*, 29 Mo. 72, 77 Am. Dec. 550; *Finney v. Cist*, 34 Mo. 303, 84 Am. Dec. 82; *Dilworth v. Fee*, 52 Mo. 130; *Silvey v. Summer*, 61 Mo. 253; *Sitton v. Sapp*, 62 Mo. App. 197; *Balch v. Myers*, 65 Mo. App. 422; *Stewart v. Mills (Mo. App.)*, 79 S. W. 988; *Redman v. Perkins*, 122 Mo. App. 164, 98 S. W. 1097; *Parks v. Barkley*, 1 Mont. 514; *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395; *Grohousky v.*

Long, 20 Neb. 362, 30 N. W. 257; *Brown v. Feagins*, 37 Neb. 256, 55 N. W. 1048; *Tarpenning v. King*, 60 Neb. 213, 82 N. W. 621; *Lachman v. Burnett*, 16 Nev. 154; *Mercereau v. Bergin*, 15 N. J. L. 244, 29 Am. Dec. 684; *Romero v. Gonzales*, 3 N. Mex. 5, 1 Pac. 511; *O'Donnell v. McIntyre*, 16 Abb. N. C. 84; *Mosseller v. Deaver*, 106 N. C. 494, 19 Am. St. Rep. 540, 11 S. E. 529, 8 L. R. A. 537; *Smith v. Findley*, 2 Handy, 70; *Oklahoma City v. Hill*, 4 Okl. 521, 46 Pac. 568; *Chisholm v. Weise*, 5 Okl. 217, 47 Pac. 1086; *McDonald v. Stiles*, 7 Okl. 327, 54 Pac. 487; *Hackney v. McKee*, 12 Okl. 401, 75 Pac. 535; *Shortess v. Wirt*, 1 Or. 90; *Altree v. Moore*, 1 Or. 350; *White v. Suttle*, 1 Swan, 169; *McRae v. White* (Tex. Civ. App.), 42 S. W. 793; *Dustin v. Cowdry*, 23 Vt. 631; *Olinger v. Shepherd*, 12 Gratt. 462; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Gore v. Altice*, 33 Wash. 335, 74 Pac. 556; *Moore v. Douglass*, 14 W. Va. 708; *Gates v. Winslow*, 1 Wis. 650; *Newton v. Leary*, 64 Wis. 190, 25 N. W. 39; *Brown v. Slater*, 23 App. D. C. 51; *Respublica v. Shryber*, 1 Dall. 68, 1 L. ed. 40.

Conceding the above proposition to be true, and we believe the acquiescence in it to be practically universal, it does not follow that evidence of title may not, for some purposes, be admissible in an action of forcible detainer. Thus, deeds may affect the question of possession, for the possession taken of a part of a tract under color of title is deemed, as we have already shown, to extend to all of the tract not in adverse possession. Hence, the general rule, that a conveyance may be admitted in evidence in so far as it bears on the question of possession: *Turnley v. Hanna*, 82 Ala. 139, 2 South. 483; *Bailey v. Blacksher*, 142 Ala. 254, 37 South. 827; *Murphy v. Snyder*, 67 Cal. 451, 8 Pac. 2; *Pearson v. Herr*, 53 Ill. 144; *Smith v. Hoag*, 45 Ill. 250; *Huftalin v. Misner*, 70 Ill. 205; *Griffin v. Kirk*, 47 Ill. App. 258; *Hewlett v. Hyden*, 4 Ind. Ter. 176, 69 S. W. 839. A deed may sometimes be admissible as bearing on the possession of property, though its purpose is not to prove that actual possession of a part as constructive possession of the whole, as where the plaintiff, after proving the possession of the property at a designated time, offered in evidence a conveyance from the possessor to himself for the purpose of showing that he had become entitled to the benefit of such possession, and the forcible entry thereon was hence an entry upon his possession: *Morgan v. Higgins*, 37 Cal. 59. "The ownership of the premises is not involved, and title cannot be tried, though sometimes evidence of title is received for the purpose of showing the character and extent of the plaintiff's possession, as well as the origin of the defendant's alleged right of possession": *Potts v. Magnes*, 17 Colo. 364, 30 Pac. 58; *Pearson v. Herr*, 53 Ill. 144; *Nicholson v. Walker*, 4 Ill. App. 404; *Ragor v. McKay*, 44 Ill. App. 79; *Moore v. Girtten*, 5 Ind. Ter. 384, 82 S. W. 848.

If the proceeding is for an unlawful or forcible detainer after a peaceable entry, conveyances are frequently admissible, as where the statute of the state permits the defendant to show that his entry

or detainer was made in good faith: *Thompson v. Smith*, 28 Cal. 527; *Dennis v. Wood*, 48 Cal. 361. Where the gist of the action is an unlawful refusal to deliver possession after a peaceable entry, the right of possession may be involved, and the defendant may show that the plaintiff had leased the property from the owner, and after the expiration of the lease the defendant had entered under a lease from the owner, for the refusal to surrender possession cannot be unlawful after the party refusing has the right to remain in possession: *Sprouse v. Story*, 144 Ala. 542, 42 South. 23. In Georgia, under a statute of that state providing for summary process for ejecting intruders, title appears to be admissible, for if the defendant took possession, not as a squatter, but under a claim of title giving him the right to the possession, he cannot be an intruder: *Poulan v. Sellers*, 20 Ga. 228. The defendant need not show the better title. His defense is sufficient if he shows he claims in good faith a legal right to the possession: *McHan v. Stansell*, 39 Ga. 197; *Thompson v. Glover*, 120 Ga. 440, 47 S. E. 953. If the plaintiff seeks to recover as purchaser at an execution sale under a statute extending the remedy to such purchasers, he must offer evidence of the judgment, execution sale, and the conveyance to him, and the court must necessarily determine their validity and effect: *Johnson v. Baker*, 38 Ill. 98. A like rule must prevail if the statute extends the remedy to grantors in possession, and the plaintiff's deeds are admissible to show that the property was conveyed to him by a grantor in possession: *Muller v. Balke*, 167 Ill. 150, 47 N. E. 355. So if, in any circumstances, the plaintiff's right to possession is dependent upon prior possession of some other person and the conveyance by such person of his rights to the plaintiff, that conveyance is admissible: *Palmer v. Frank*, 169 Ill. 90, 48 N. E. 426. Under a statute authorizing the maintenance of the action against a grantor who, having conveyed, refuses to deliver, the deed of such grantor must be admissible: *Peters v. Balke*, 170 Ill. 304, 48 N. E. 1012. When the claim is made that the entry was peaceable, but that the defendant unlawfully refused to surrender possession, evidence of the fact that the plaintiff had parted with his right of possession, of any he ever had, or that the defendant so entering was an owner entitled to the possession, should be received: *Mueller v. Newell*, 29 Ill. App. 192; *Bloomington v. Brophy*, 32 Ill. App. 400.

A statute of Indian Territory declares that "when any person shall willfully and with force hold over any lands, tenements or other possessions after the determination of the time for which they were dismissed or let to him, or shall lawfully and peaceably obtain possession, but shall hold the same unlawfully and by force, or shall fail or refuse to pay rent therefor when due, and after demand made in writing for the delivery of the possession thereof by the person having the right to such possession, his agent or attorney shall refuse to quit such possession, such person shall be deemed guilty of an unlawful detainer." In a proceeding for unlawful detainer, the

court looked at the titles of the plaintiff and defendant and determined in the case before it that the title claimed by the defendant was void, but that no recovery could be had by the plaintiff, for the reason that his title was also invalid: *Sanders v. Thornton*, 2 Ind. Ter. 92, 48 S. W. 1015.

In Kansas the question whether the defendant entered upon and occupied the land under color of title may be material, and when it is so, he is entitled to prove to the jury and to have an instruction upon the effect of his evidence, if he offered testimony to prove that he entered as oral assignee of one who had a contract of purchase with the owner of the property: *Alderman v. Boeken*, 25 Kan. 658. "Of course," said the supreme court of that state, "title absolute may not justify forcible and violent entry (for the law does not allow disturbance of the peace in order to acquire possession, and a party having such title and right of possession must resort to legal means to acquire that possession), yet evidence of such title and right of possession is competent in order to show the purpose with which the entry was made and to uphold possession if once peaceably obtained": *Conaway v. Gore*, 27 Kan. 122.

In Kentucky, the defendant may show that he was at first a subtenant of the plaintiff and the lease expired, whereupon the defendant leased the lands from the original lessor, and holds possession under him: *Elms v. Randall*, 2 Dana, 100.

In Nebraska, "a justice of the peace, while precluded from acting where the title is in dispute, has an authority to receive deeds or other evidences of title to show the right of such party to the possession": *Galligher v. Connell*, 23 Neb. 391, 36 N. W. 566; and "in all cases where a party in possession claims an interest in the land itself, the action of forcible entry and detainer will not be allowed," and therefore, if the defendant went into possession under a contract of purchase from the plaintiff, the latter cannot maintain the action: *Chicago B. & Q. R. R. Co. v. Skupa*, 16 Neb. 341, 20 N. W. 393; *Malloy v. Malloy*, 24 Neb. 766, 40 N. W. 285. In that state a duplicate receipt of the receiver of the United States land office was admitted in evidence to sustain the right of the holder to maintain the action for forcible entry and detainer: *Moore v. Parker*, 59 Neb. 29, 80 N. W. 43. Though a claim of ownership ousts the justice's court of its jurisdiction, this is not true when the claim is clearly "specious": *Clark v. Tukey Land Co.*, 75 Neb. 326, 106 N. W. 328.

Under the statutes of Oklahoma governing the action of unlawful and forcible entry or unlawful detainer, the action is purely a possessory action, and the title to the real estate in question cannot properly be put in issue. Deeds and other evidences of title may ordinarily be offered in evidence and proof of the right of possession: *Oklahoma City v. Hill*, 4 Okl. 521, 46 Pac. 568. If, in any case of forcible entry or unlawful detainer, where the defendant sets up title in himself and attempts to raise such an issue be-

fore a justice of the peace, the justice should ignore or strike out such answer, and proceed with the trial of the cause as if no such answer had been filed: *Chisholm v. Weise*, 5 Okl. 217, 47 Pac. 1086; *McDonald v. Stiles*, 7 Okl. 327, 54 Pac. 487.

In South Carolina, the defendant may prove a parol contract for the renting of the land "to show that he entered and held possession under a bona fide claim of right, and not, as alleged in the complaint, wantonly or with force and arms and not in violation of the plaintiff's rights, and therefore was not liable to punitive damages": *Newell v. Taylor*, 74 S. C. 8, 54 S. E. 212.

In Tennessee, title as such is not provable in the action, yet it is not error for the court to permit the reading of title papers to the jury, if the instruction clearly states that they could not inquire into the title, but only as to the possession, and that the title papers had been permitted to be read to them only to show the character of the holding of the parties: *Settle v. Settle*, 10 Humph. 504. So if defendant insists that a tenant from whom he obtained possession entered as tenant under a contract with one B, and not as tenant of the plaintiff, and afterward attorned to the plaintiff without the consent of B, the defendant may be permitted to prove that the attornment was procured by fraud or was the result of mistake, and that the title was in B, and deeds are admissible in evidence to establish this contention: *Allison v. Casey*, 4 Baxt. 587.

In a few of the states provision is made by statute for converting the action of forcible entry and detainer into what is styled a statutory ejectment. When this is done in Alabama, the action is removed from the justices of the peace to the circuit courts, and there the plaintiff must recover on the strength of his legal title, "unless he can prove that the defendant or those under whom he claims entered on such lands under some contract or agreement between the plaintiff and those under whom he claims, or by the use of force": *Moye v. Thurber*, 146 Ala. 180, 40 South. 822. Under the statutes of Washington the plaintiff must embody in, or append to, the complaint an abstract of his title, and the answer must state whether the defendant makes any claim of title, and if he makes such claim or claims a right of possession, the answer must state the grounds on which that right is claimed. If the answer denies the plaintiff's claim of ownership and sets up facts showing that the defendant has a legal claim to the possession, the action must stand for trial as one of ejectment. If the plaintiff proves title to the premises, and that the defendant entered without permission and without color of title, and due notice has been given him to remove, and that he has not complied therewith, a prima facie case is made out for the plaintiff: *Columbia etc. R. Co. v. Moss*, 43 Wash. 589, 87 Pac. 951.

2. **That the Property is Part of the Public Domain.**—The fact that the land of which possession is sought to be recovered is part of the public domain appears to constitute no justification for the forcible

entry thereon, though for the purpose of initiating a pre-emption or homestead right, if previously in the possession of another, and hence is no defense to the action by him to recover his possession: *Cunningham v. Green*, 3 Ala. 127; *Randall v. Falkner*, 41 Cal. 242; see note to 120 Am. St. Rep. 57. In Nebraska, where both parties claimed under the laws of the United States, one as a homestead and the other as a timber culture act claimant, the court refused to entertain jurisdiction of their controversy, on the ground that it involved claims of title which the court was not competent to try: *Streeter v. Rolph*, 13 Neb. 388, 14 N. W. 166. In Oklahoma, on the other hand, the statute provides that the action is maintainable where the defendant is a settler or occupier without color of title of lands of which the plaintiff has the right of possession. Under this statute, when the contest for the settlement has been settled adversely to the defendant in the land department of the United States, the successful party may recover possession by an action of forcible detainer: *Cox v. Garrett*, 7 Okl. 384, 54 Pac. 546; *Cope v. Braden*, 11 Okl. 291, 67 Pac. 475; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. Rep. 648, 44 L. ed. 801.

3. **Termination of the Plaintiff's Title.**—Where the entry was forcible, doubtless the usual rule that title is not involved, and that the party obtaining possession by force must surrender, would prevent the successful assertion of the defense of the termination of the plaintiff's title, but where the action is in the nature of an unlawful detainer merely, there can be no doubt that the defendant may show that he did not, at the commencement of the action, unlawfully detain the property from the plaintiff, for the reason that whatever right of possession he or his predecessors at any time had terminated before such commencement. Therefore, if the plaintiff claims under a lease, the defendant may show that such lease had been surrendered or had otherwise terminated before the commencement of the action: *Mairs v. Sparks*, 5 N. J. L. 513. Pendente lite changes of possession or of the right thereto do not abate the action or destroy the plaintiff's right to recover possession: *Daggitt v. Mensch*, 41 Ill. App. 403; *Casey v. King*, 98 Mass. 503.

4. **Prior Possession by the Defendant.**—Where the proceeding is of such a nature that the right to the possession is not in issue, it cannot be material that the defendant, before he made his forcible entry, had been in possession of the same property, even though he had been forcibly dispossessed by the plaintiff, for one forcible entry cannot be set off against another, and if an entry, though forcible, has resulted in placing one in the peaceable possession of the property, such possession is to the same extent as any other protected from other forcible entries: *Roff v. Duane*, 27 Cal. 565; *Brown v. Perry*, 39 Cal. 23; *King's Admr. v. St. Louis G. L. Co.*, 34 Mo. 34, 84 Am. Dec. 68; *Meriwether v. Howe*, 48 Mo. App. 148.

5. **Estoppel.**—We have not observed any instance in which an estoppel has been successfully urged as a defense to an action of forcible entry, and probably such a defense must always be excluded, on the ground that it necessarily presents an issue of title not triable in the action, or a cause for equitable interposition to be had only by resort to a court of chancery jurisdiction: *St. Louis Nat. Stockyards v. Wiggins F. Co.*, 102 Ill. 514; *Jones v. Commonwealth (Ky.)*, 104 S. W. 782; *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395.

6. **Invalidity or Unlawfulness of a Lease.**—If peaceable possession exists, we assume that no person has a right to forcibly enter thereon, on the ground that the property has been acquired for immoral purposes, and, on the other hand, that when a lessor is seeking to recover possession, it cannot be held from him under a lease for such a purpose: *Toby v. Schultz*, 51 Ill. App. 487; *King v. Wilson*, 1 Neb. (Unof.) 93, 95 N. W. 494; for if the lease is void, the rights of the parties thereto must, for most purposes, be the same as if it had never existed, and if the property is made the subject for forcible entry and detainer, it must be decided by practically leaving the lease out of consideration.

7. **Bankruptcy of the Defendant.**—The fact that the defendant, since committing the forcible entry, has been adjudicated a bankrupt constitutes no reason for his being permitted to retain possession, nor apparently does it exonerate him for any liability for damages. Therefore, the action may proceed notwithstanding such adjudication and the same judgment be entered therein as if his bankruptcy had not occurred: *Lomax v. Spear*, 51 Ala. 532.

8. **Counterclaims.**—Counterclaims and cross-defenses are not assertable in actions of forcible entry: *Mark v. Schumann P. Co.*, 105 Ill. App. 490; *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395. Hence the defendant may not assert either as a defense or a counterclaim that he has erected improvements on the property under an agreement that he should be paid therefor: *Connolly v. Giddings*, 24 Neb. 131, 37 N. W. 939. Though there is in force what is styled an occupying claimant's law under which a claimant is, in some circumstances, entitled to be paid for improvements placed by him on the land while in possession thereof, this cannot prevent a recovery of the property by proceedings in forcible entry and detainer, though such improvements were made while the plaintiff and the defendant were contending for the right to acquire title to the land as part of the public domain of the United States: *Cook v. McCord*, 13 Okl. 506, 75 Pac. 294; *Howe v. Parker*, 18 Okl. 282, 90 Pac. 15.

9. **Equitable Defenses.**—It may be conceded that equitable defenses as such are not permissible in proceedings for forcible entry, nor even for forcible or unlawful detainer. Thus, if the defendant is entitled to relief against plaintiff's title on the ground of fraud, he must resort to an independent suit in chancery to obtain such relief: *Gale v. Eckhart*, 107 Mich. 465, 65 N. W. 274; *Dysart v. En-*

slow, 7 Okl. 386, 54 Pac. 550; and in Mississippi the statement has been made that "the legal title of the property cannot be considered or adjudicated, nor can any secret equities which may exist between the parties be investigated or decided." Hence it was concluded that the defendant might not assert as a defense that he had conveyed the property to the plaintiff to be held until certain payments had been made, after which he was to execute a reconveyance, and that plaintiff had repudiated this agreement: *Clark v. Bourgeois*, 86 Miss. 1, 38 South. 187. This is in harmony with the decision that the defendant cannot show that the property was conveyed to plaintiff as security for a loan: *Aurner v. Pierce*, 106 Ill. App. 206. The provisions of the statute of Missouri prohibiting an inquiry into the title in actions of forcible entry are applicable to attempts to assert equitable titles, and a pleading alleging such a title in proceedings before a justice of the peace does not require him to certify the proceedings to the higher court for trial: *Graham v. Conway*, 91 Mo. App. 391. Nevertheless, it has been held in that state that a defendant in possession under a contract of purchase cannot be removed by an action of forcible entry and detainer: *McCartney's Admx. v. Alderson*, 45 Mo. 35. It is, however, probably going too far to assert that in no case can an equitable title or defense be interposed, if the plaintiff relies not on a forcible entry, but only upon a detainer after peaceable entry, for matters which would support a claim of title may also tend to support a claim that the possession has not been lawfully withheld. In Iowa a defendant pleaded that the plaintiff held title under an agreement that it was to be transferred to the defendant on the payment of a specified sum. A demurrer to the plea was sustained, but the supreme court reversed the judgment, on the ground that the pleadings showed that the defendant had a right to be in possession of the land: *Jordan v. Walker*, 52 Iowa, 647, 3 N. W. 679; and this decision was followed by another holding that the defendant might show that he was in possession under a contract to purchase the property from the plaintiff, and hence entitled to continue therein: *Hall v. Jackson*, 77 Iowa, 201, 41 N. W. 620. In Kansas, there is no doubt that an equitable title may, to the same extent as any other, be relied on as a defense in an action of forcible entry: *Alderman v. Boeken*, 25 Kan. 658; and accordingly a defendant was permitted to prove that he had purchased and paid for the land and received a conveyance from the plaintiff, which, from error or mistake in drafting, did not include the land intended to be conveyed: *Conaway v. Gore*, 27 Kan. 122. In Nebraska, if it appears that the defendant acquired possession under a contract of purchase, the court will not proceed to dispossess him, though it is alleged that he has made default in the payments stipulated for in the contract. The ground of the refusal was, that as the defendant might have some equitable interest, the court, in proceedings in forcible entry and detainer, had no jurisdiction of the cause: *Chicago B. & W. R. R. Co. v. Skupa*, 16 Neb. 341, 20 N. W. 393.

10. **Limitation and Prescription.**—Doubtless one making a forcible entry upon real property and acquiring a possession thereunder may maintain it for such time and under such circumstances as to effectually divest the title of the owner, whether the latter was the person on whose possession the entry was made or not, and hence acquire title by prescription susceptible of being asserted as a defense to any proceeding based on the forcible entry of any subsequent detainer founded thereon: *Kincheloe v. Tracewells*, 11 Gratt. 587. Generally, however, statutes are in force which preclude a forcible entry from being asserted as a cause of action after a time much shorter than that required to create a prescriptive title. Among these statutes are those of Alabama, Georgia, Maine, Massachusetts, Mississippi, Tennessee, Virginia and West Virginia fixing the limitation at three years: *De Lagal v. Wallace*, 48 Ga. 408; *Morton v. Thompson*, 13 Me. 162; *Mitchell v. Shanley*, 12 Gray, 206; *Loring v. Willis*, 4 How. (Miss.) 383; *Miller v. Tillman*, 61 Mo. 316; *Buck v. Endicott*, 103 Mo. App. 248, 77 S. W. 85; *Phillips v. Sampson*, 2 Head, 429; *Thompson v. Holt*, 9 Humph. 407; *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. 392; *Billingsley v. Stutler*, 52 W. Va. 92, 43 S. E. 95; California, Montana, and Nebraska fixing the time at one year: *Cal. Code Civ. Proc.*, sec. 1172; *Boardman v. Thompson*, 3 Mont. 387; *Weatherford v. Union R. R. Co.*, 74 Neb. 229, 104 N. W. 183; of Kansas, two years: *Alderman v. Boeken*, 25 Kan. 658; and of Iowa, thirty days: *Fultz v. Black*, 3 Iowa, 569. The time specified in the statute is not available as a defense where, within such time, the defendants attorned to plaintiff: *Barnwell v. Stephens*, 142 Ala. 609, 38 South. 662; or promised to pay him rent: *Barefoot v. Wall*, 108 Ala. 327, 18 South. 823. In Oklahoma, where the plaintiff has obtained title as a result of a decision of the land department of the United States, and the defendant was an adverse claimant before such department, the statute does not commence to run until the contest is finally determined by the department: *Cope v. Braden*, 11 Okl. 291, 67 Pac. 475; *McQuiston v. Walton*, 12 Okl. 130, 69 Pac. 1048; *Brown v. Hartshorn*, 12 Okl. 121, 69 Pac. 1049; *Burns v. Noell*, 12 Okl. 133, 69 Pac. 1076; *Steele v. Noell*, 12 Okl. 137, 69 Pac. 1077; *Hackney v. McKee*, 12 Okl. 401, 75 Pac. 535; and the statute continues to run until the summons issues regardless of the time of filing the complaint: *Greenemayer v. Coate*, 12 Okl. 452, 72 Pac. 377. In one state it is necessary that the plaintiff have knowledge of the possession held by the defendant or his predecessors in interest: *Fultz v. Black*, 3 Iowa, 569, but generally, the statute runs from the time the possession is adverse: *Loring v. Willis*, 4 How. (Miss.) 383; and the statute in force when the action or proceeding is commenced controls: *Manchester v. Dodridge*, 8 Ind. 360.

DEDRICK v. FARMERS' BANK OF STAFFORD.

[75 Kan. 187, 88 Pac. 883.]

RES JUDICATA—Effect of an Adjudication in Bankruptcy as Against Preferred Creditors.—An adjudication in bankruptcy upon the ground that the bankrupt sold and encumbered his property with intent to hinder, delay and defraud his creditors is conclusive in a proceeding involving the same issues in another court, and if the adjudication is on the ground that the bankrupt preferred certain creditors by giving them a mortgage on his property, and his trustee in bankruptcy sues to recover it from them, they are not entitled, in their defense, to show that they received the mortgage in good faith, without any knowledge or notice of the insolvency of the mortgagor, or of his fraudulent purpose, or his intent to give them a preference over other creditors. (p. 415.)

Fairchild & Lewis, for the plaintiff in error.

C. G. Webb and Prigg & Williams, for the defendants in error.

¹⁸⁸ **GRAVES, J.** This is a suit to recover property, or the value thereof, alleged to have been mortgaged in violation of the United States bankruptcy law. The defendants recovered judgment for costs, and the plaintiff brings the case here for review.

The mortgagor, J. H. Shirfey, was on and prior to December 11, 1902, engaged in the mercantile business at Stafford, in Stafford county. On that date he executed a mortgage upon his entire stock of goods to J. P. H. Dykes and J. N. Rose, who in consideration thereof agreed to satisfy a debt due from the mortgagor to the Farmers' Bank of Stafford, for which they were sureties.

At the time this mortgage was given the mortgagor was indebted to other parties, some of whom joined in a petition to a district court of the United States to have the mortgagor adjudged to be a bankrupt. The execution of the mortgage above mentioned constituted the act of bankruptcy charged against the bankrupt in the petition. The averments of the petition were in substance that the mortgage was given by the mortgagor with the intent to hinder, delay and defraud his creditors, all of which was well known to the mortgagees when the mortgage was taken.

¹⁸⁹ Upon this application the mortgagor was adjudged to be a bankrupt, January 10, 1903. Afterward the plaintiff was duly appointed trustee of the estate of the bankrupt, and as

such commenced this suit in the district court of Stafford county to cancel the mortgage and recover the value of the mortgaged property from the defendants. The petition contained the usual and proper recitals, and stated fully the proceedings had in the court of bankruptcy, and also alleged that the effect of the act of bankruptcy complained of was to prefer the mortgagees over other creditors.

On the trial the plaintiff introduced in evidence the proceedings and adjudication in bankruptcy, and rested. The defendants were then permitted to show that they received the mortgage in good faith, without any knowledge or notice of the insolvency of the mortgagor or of his fraudulent purpose or his intent to give them a preference over other creditors. This was error. An adjudication of bankruptcy upon the ground that the bankrupt sold or encumbered his property with intent to hinder, delay and defraud his creditors is conclusive: *Sherman v. Luckhardt*, 67 Kan. 682, 74 Pac. 277.

This is conceded to be the law of this state, but the admission of the evidence is justified upon the ground that the petition in the court of bankruptcy alleged two acts of bankruptcy against the bankrupt, the first being a violation of clause "e" of section 67, and the other of clause "b" of section 60 of the national bankruptcy act (3 U. S. Comp. Stats. 1901, pp. 3449, 3445), and that as the decree of the court does not specify the ground upon which the adjudication was placed it is not conclusive against these defendants, who were not parties thereto. However, after a careful examination of that petition we are unable to find more than one act of bankruptcy alleged therein, and that is the one first above mentioned. What is stated concerning a preference does not constitute a violation of the bankruptcy act, and evidently was not intended by the ¹⁹⁰ pleader to charge an act of bankruptcy under clause "b" of section 60, and the court could not have regarded the petition as containing more than the one charge. It follows, therefore, that the evidence presented concerning the good faith of the defendants was immaterial, and was erroneously admitted. The judgment of the district court must have been founded wholly upon this evidence, and it is also erroneous.

The judgment is reversed, with direction to enter judgment for the plaintiff in such sum as the evidence shows the mortgaged property to be worth.

A Judgment of One Court is Conclusive in another in an action between the same parties, not only as to the same cause of action, but as to other causes involving the right or title asserted and the defenses interposed in the previous action: *Rew v. Independent School Dist.*, 125 Iowa, 28, 106 Am. St. Rep. 282; *Brack v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200; *Chicago etc. R. R. Co. v. Cass County*, 72 Neb. 489, 117 Am. St. Rep. 806.

RODGERS v. MISSOURI PACIFIC RAILWAY COMPANY.

[75 Kan. 222, 88 Pac. 885.]

NEGLIGENCE, Loss Resulting Partly from and Partly from Other Causes.—If a carrier is guilty of negligence not in itself harmful, but wrongful only because of injurious consequences which may follow, and a new cause intervenes between such negligence and the injury complained of, which new cause is not a consequence of the original negligence, which reasonable prudence on the part of the original wrongdoer could not have anticipated, and but for which the injury could not have happened, the new cause is the proximate cause, and the original negligence is disregarded as not affecting the result. (p. 417.)

CARRIERS do not Assume the Risk of Loss Caused by the Act of God. (p. 417.)

CARRIER'S NEGLIGENCE, Liability for When Followed by an Act of God.—If a carrier negligently delays the transportation of goods, so that they are subsequently exposed to, and destroyed or injured by, an act of God, such as storm or flood, to which they would not have been exposed had they been transported with reasonable diligence, the proximate cause of the injury is the act of God and not the negligence, and the carrier is not answerable for damages. (pp. 424, 434.)

W. W. Redmond, for the plaintiff in error.

Waggener, Doster & Orr, for the defendant in error.

222 BURCH, J. Plaintiff sued the railroad company for the value of a carload of corn. The right to recover was predicated upon the defendant's negligence. The corn was delivered to the company at Frankfort, on May 22, 1903, for transportation and delivery to the plaintiff's agent at Kansas City, Missouri. The loaded car stood on the track at Frankfort until May 28th, when it was hauled to its destination, only to be overtaken and destroyed by the unprecedented flood of May 30, 1903. The delay was protracted through the negligent omission of the company to move the car. The flood was

an act of God. The district court rendered judgment for the defendant, and the plaintiff prosecutes error.

If the fundamental principles of legal liability for negligence are to be regarded, the judgment of the district court is correct. The maxim is, "*In jure non remota causa, sed proxima, spectatur.*" If a carrier be guilty of negligence not in itself harmful, but wrongful only because of injurious consequences which may ²²⁸ follow, and a new cause intervene between such negligence and the injury complained of, which new cause is not a consequence of the original negligence, which reasonable prudence on the part of the original wrongdoer could not have anticipated, and but for which the injury could not have happened, the new cause is the proximate cause and the original negligence is disregarded as not affecting the final result.

Carriers do not assume the risk of loss caused by the act of God.

Sir Frederick Pollock, a man admirably fitted by temperament, learning and literary skill to do so, has summed up the law relating to proximate cause, as established by the judicial wisdom of England, in his book on Torts. He develops the essential principles in the following eminently scientific way:

"We shall now consider for what consequences of his acts and defaults a man is liable. When complaint is made that one person has caused harm to another, the first question is whether his act was really the cause of that harm in a sense upon which the law can take action. The harm or loss may be traceable to his act, but the connection may be, in the accustomed phrase, too remote. The maxim, '*In jure non remota, causa sed proxima, spectatur,*' is English in Bacon's constantly cited gloss: 'It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' Liability must be founded on an act which is the 'immediate cause' of harm or of injury to a right. . . . The meaning of the term 'immediate cause' is not capable of perfect or general definition. Even if it had an ascertainable logical meaning, which is more than doubtful, it would not follow that the legal meaning is the same. In fact, our maxim only points out that some consequences are held too remote to be counted. What is the test of remoteness we still have to inquire. The view which I shall endeavor to justify is that, for the purpose of

civil liability, those consequences, and those only, are deemed 'immediate,' 'proximate,' or, to anticipate a little, ²²⁴ 'natural and probable,' which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. . . . This principle is commonly expressed in the maxim that 'a man is presumed to intend the natural consequence of his acts'; or, in the terms of a judicial statement, 'a party must be considered, in point of law, to intend that which is the necessary and natural consequence of that which he does.' . . . Although we do not care whether the man intended the particular consequence or not, we have in mind such consequences as he might have intended, or, without exactly intending them, contemplated as possible; so that it would not be absurd to infer as a fact that he either did mean them to ensue, or recklessly put aside the risk of such consequences ensuing. This is the limit introduced by such terms as 'natural'—or, more fully, 'natural and probable'—consequences. . . . The doctrine of 'natural and probable consequence' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is a failure to act with due foresight; it has been defined as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability. And the statement proposed, though not positively laid down, in *Greenland v. Chaplin*, namely, 'that a person is

expected to anticipate ²²⁵ and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur,' appears to contain the only rule tenable on principle where the liability is founded solely on negligence. 'Mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated,' may be the ground of legal compensation under some rule of exceptional severity, and such rules, for various reasons, exist; but under an ordinary rule of due care and caution it cannot be taken into account': Pollock on Torts, 6th ed., 28, 30, 33, 34, 39.

A similar service has been performed for the jurisprudence of the United States by Thomas M. Cooley. Under the title "Proximate and Remote Cause," he says:

"It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate and not the remote cause of any event is regarded; and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote, cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and insufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact ²²⁶ conclusions futile. A writer on this subject has stated the rule in the following language: If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the

ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.

“As this principle is of the highest importance in the law of torts, and the right of action in many cases, and the extent of recovery in others, depends upon it, it may be well to consider it a little further. In doing this we lay down the following propositions:

“(1) The one already more than once mentioned, that in the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence.

“(2) When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause.

“(3) If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote”: Cooley on Torts, 3d., ed., 99.

This text is illustrated by the “squib case” (Scott v. Shepherd, 3 Wils. (Eng.) 403, 2 W. Black. 892), the “balloon case” (Guille v. Swan, 19 Johns. 381, 10 ²²⁷ Am. Dec. 234), the flood case of Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695, and by others. The statement and discussion of Morrison v. Davis, which is strictly analogous in its facts to the present case, are as follows: “In that case common carriers undertook to transport goods from Philadelphia to Pittsburg by canal. While on their way the goods were destroyed by an

extraordinary flood. There was evidence that the goods would not have been at the place of injury but for their having been delayed by the lameness of a horse attached to the boat; and the argument made on behalf of the plaintiff was that the culpability of the defendants in allowing the boat to be delayed by the lameness of the horse, having exposed to the boat to the flood, was the proximate cause of the loss. Now, if human foresight could foresee the exact time when such a flood might be anticipated, the argument would be unanswerable; but as this is impossible, and an accident of the sort is as likely to overwhelm a boat that has been moved with due diligence as one that has been unreasonably delayed, it is obvious that the antecedent probabilities are equal that the delay will save the boat instead of exposing it to destruction. As is said by the court in the case referred to: 'A blacksmith pricks a horse by careless shoeing. Ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use; but it could not anticipate that by reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider; and such injury would be no proper measure of the blacksmith's liability'": Cooley on Torts, 3d ed., 107.

Two acute and able authors, Mr. Hughes and Professor Street, have recently undertaken to rescue the drifting doctrines of the law from the flood of "cases" pouring from the multitude of opinion writing courts in this and other countries, and to bring them back to safe moorings. They seek to do this by an investigation of the fountainheads of the law, its maxims and the utterances of its great masters, and by a consideration of its history and philosophy, to the neglect of ²²⁸ "weight-of-authority" decisions and those which are merely "recent." Mr. Hughes indicates his views upon the matter in hand as follows: "From the definition of negligence it appears that, to be actionable, it must result from an act of commission or omission in violation of a law commanding or forbidding it; consequently it must be the natural, direct and probable cause of the injury complained of. . . . If an independent agency intervene, this will break the causal connection, unless under all the circumstances of the case, this intervention itself should have been anticipated": 2 Hughes on Procedure, 1043.

Professor Street refers to *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695, and *Denny v. New York Central R. R. Co.*, 79

Mass. 481, 74 Am. Dec. 645—another case involving delay by a carrier and loss by flood—in the following language: “In the following cases the admitted or established negligence of the defendant was held not to be the effective legal cause or proximate cause of the damage or injury for which recovery was sought. It is obvious that in these cases the damage could not be said to be the natural result of the negligence declared on. It was simply due to some other factor. And the conclusion reached in these cases must be the same whether liability is supposed to extend to all natural consequences or only to such as may be foreseen”: 1 Street on Foundation of Legal Liability, 118.

This court has upon numerous occasions discussed the principles upon which the problem involved must be solved: Atchison etc. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; Cleghorn v. Thompson, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 402; Consolidated E. Light & P. Co. v. Koepp, 64 Kan. 735, 68 Pac. 608; Missouri Pac. Ry. Co. v. Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Stephenson v. Corder, 71 Kan. 475, 114 Am. St. Rep. 500, 80 Pac. 938, 69 L. R. A. 246; Schwarzschild v. Weeks, 72 Kan. 190, 83 Pac. 406, 4 L. R. A., N. S., 515. See, also, the opinion of Garver, J., in Chicago & W. Ry. Co. v. Bell, 1 Kan. App. 71, 41 Pac. 209.

²²⁹ In the early case of Atchison etc. R. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362, Mr. Justice Valentine said: “In law, proximate and remote causes and effects do not have reference to time, nor distance, nor merely to a succession of events, or to a succession of causes and effects. A wrongdoer is not merely responsible for the first result of his wrongful act, but he is also responsible for every succeeding injurious result which could have been foreseen, by the exercise of reasonable diligence, as the reasonable, natural and probable consequence of his wrongful act. He is responsible for any number of injurious results consecutively produced by impulsion, one upon another, and constituting distinct and separate events, provided they all necessarily follow from the first wrongful cause. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. But whenever a new cause intervenes which is not a conse-

quence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequence must be deemed to be too remote to constitute the basis of a cause of action."

In the case of *Missouri Pac. Ry. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399, it was charged that grain-doors for cars were negligently piled and permitted to remain upon a depot platform. A severe gale blew them upon the railway track, causing the derailment of an engine and the death of its fireman. It was held that the gale was the proximate cause of the fireman's injuries. The syllabus reads: "In a case where two distinct, successive causes, wholly unrelated in operation, contribute toward the production of an accident resulting in injury and damage, ²³⁰ one of such causes must be the proximate, and the other the remote, cause of the injury.

"A prior and remote cause cannot be made the basis of an action for the recovery of damages if such remote cause did nothing more than furnish the condition, or give rise to the occasion, by which the injury was made possible, if there intervened, between such prior or remote cause and the injury, a distinct, successive, unrelated and efficient cause of the injury."

In the case of *Stephenson v. Corder*, 71 Kan. 475, 114 Am. St. Rep. 500, 80 Pac. 938, 69 L. R. A. 246, a man tied his mare to a hitching-rail on a public street. The chin-strap of the halter was defective. A boy struck the mare on the nose with his foot while turning "flip-flops" over the rail. She broke loose, ran away, collided with a buggy, and injured its occupant. It was held that the striking of the mare on the nose by the boy's foot was the proximate cause of the injury. The court said: "The injurious result would not have followed had not the new and independent cause intervened. This new cause had no causal connection with the negligence of Stephenson. The hitting of the mare on the nose by the boy was not caused by the defect in the halter, nor was it under the control of Stephenson; nor can it be said with the slightest fairness that it could have been foreseen by the exercise of reasonable diligence on his part."

It is scarcely worth while to debate further than these authorities have done the propriety of the rule that a carrier cannot be negligent, and therefore liable in damages, for omitting to take precautions against events which are beyond human foresight and which he does not cause. He is obliged to anticipate that delay in transportation may result in the deterioration of perishable freight, and that fluctuating markets may fall, but he cannot be charged with foreknowledge of floods like the one which devastated the railroad yards at Kansas City in 1903. He is under no duty to make provision against such phenomena. In the present case there is no causal relation between the ²³¹ negligence charged and the catastrophe which overtook the plaintiff's property. The carrier's delay did not produce the flood, and for all the carrier could foresee promptitude might have been as dangerous as delay. The delay was a mere incident to the destruction of the car of grain. The *causa causans* was the flood, the inevitableness of which could not be determined by anything which the carrier might do. As expressed by Mr. Justice Peters in the case of *O'Brien v. McGlinchy*, 68 Me. 552, the negligence of the carrier had but a casual, while the flood had a causal, connection with the ultimate event.

Little can be added to the reasons given by Lord Bacon and Judge Cooley for resting responsibility upon the proximate cause. The pages upon pages of dreary disquisition upon the subject attest the folly of embarrassing the administration of justice by entangling it in logical and metaphysical refinements and subtleties. It is sufficiently difficult in most cases to ascertain even the proximate cause. The affairs of life are so varied and complicated, the relations of cause and consequence so complex and far-reaching, that the law, as a practical science, cannot, with any degree of safety or assurance, pass beyond the near, efficient and predominating cause to investigate whether others more remote have contributed to an event. If it were to attempt to do so, and negligence in any degree were to be counted, the punishment might be outrageously disproportionate to the fault; and a maze of difficulties would encompass every effort to make a just apportionment of damages. As Mr. Justice Marston, of the supreme court of Michigan, has said: "It may be true that had there been no delay whatever on the part of the defendant the loss would not have happened. The law, however, cannot enter upon an examination of, or inquiry into, all the con-

curing circumstances which may have assisted in producing the injury, and without which it would not have occurred. To do so would only be to involve the whole ²³² matter in utter uncertainty, for when once we leave the direct, and go to seeking after remote, causes, we have entered upon an unending sea of uncertainty, and any conclusion which should be reached would depend more upon conjecture than facts": *Michigan Cent. R. R. Co. v. Burrows*, 33 Mich. 6.

The principles discussed have been applied in the following among other cases: *Memphis R. R. Co. v. Reeves*, 77 U. S. 176, 19 L. ed. 909 (freight not forwarded promptly—overtaken by unprecedented flood. See, also, *St. Louis etc. Ry. v. Commercial U. Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. Rep. 554, 35 L. ed. 154); *Empire State Cattle Co. v. Atchison etc. Ry. Co.*, 135 Fed. 135 (shipment of cattle delayed by negligence—loss at Kansas City by flood of 1903. In the opinion Pollock, district judge, collates decisions of the federal courts); *Lehman v. Pritchett*, 84 Ala. 512, 4 South. 601 (delay in executing order to sell cotton—loss by fire); *James v. James*, 58 Ark. 157, 23 S. W. 1099 (failure to gin cotton promptly—destruction by fire); *Rodgers v. Central P. R. R. Co.*, 67 Cal. 607, 8 Pac. 377 (defective bridge destroyed by cloudburst); *Dubuque Wood etc. Assn. v. City and County of Dubuque*, 30 Iowa, 176 (delay in repairing bridge—wood awaiting removal lost by flood); *Dalzell v. Steamboat Saxon*, 10 La. Ann. 280 (delay in carriage of goods—injury by sudden rise of river); *Denny v. New York Central R. R. Co.*, 79 Mass. 481, 74 Am. Dec. 645 (delay in transporting wool—loss by flood. See, also, *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106); *Michigan Central R. R. Co. v. Burrows*, 33 Mich. 6 (delayed freight encountered freezing weather. See, also, *Carnegie, Phipps & Co. v. Holt*, 99 Mich. 606, 58 N. W. 623); *Merchants' Wharfboat Assn. v. Wood & Co.*, 64 Miss. 661, 60 Am. Rep. 76, 2 South. 76; *Yazoo etc. R. R. v. Millsaps*, 76 Miss. 855, 25 South. 672 (failure to ship cotton at first opportunity—loss by fire); *Clark v. Pacific R. R.*, 39 Mo. 184, 90 Am. Dec. ²³³ 458 (transportation delayed—on arrival at destination goods destroyed by public enemy); *Grier v. St. Louis etc. R. R.*, 108 Mo. App. 565, 84 S. W. 158; *Moffatt Commission Co. v. Union Pac. R. R. Co.*, 113 Mo. App. 544, 88 S. W. 117; *Elam v. St. Louis & S. F. R. Co.* (Mo. App.), 93 S. W. 851 (these cases involve losses consequent upon the Kansas and Missouri river floods

of 1903); *McVeagh & Co v. Atchison etc. Ry. Co.*, 3 N. Mex. 205, 5 Pac. 457 (failure to forward goods—seizure on legal process); *General Extinguisher Co. v. Carolina & N. W. R. R.*, 137 N. C. 278, 49 S. E. 208 (negligent failure to forward goods—loss by fire); *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264 (tug towing barge suspended voyage—after voyage resumed barge destroyed by storm); *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695 (canal-boat drawn by lame horse wrecked by flood. See, also, *Jones v. Gilmore*, 91 Pa. 310); *Lamont v. Nashville & Chattanooga R. R. Co.*, 9 Heisk. (Tenn.) 58 (neglect to forward goods promptly—loss by flood); *Gulf C. & S. F. Ry. Co. v. Darby*, 28 Tex. Civ. App. 229, 67 S. W. 129; *International & G. N. R. Co. v. Bergman* (Tex. Civ. App.), 64 S. W. 999 (delay in delivering shipment of wheat—loss by great storm at Galveston); *Davis v. Central V. R. R. Co.*, 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313 (delay in forwarding grain stored in defendant's elevator—elevator burned); *Herring v. Chesapeake & W. R. Co.*, 101 Va. 778, 45 S. E. 322 (delay in transporting stock—damage by exceptional snow and cold).

The question of the carrier's liability as an insurer of freight was not involved in some of the decisions cited. But it must be obvious that if the law, not only for practical reasons but as a means of substantial justice, altogether rejects and refuses to consider remote causes and regards the proximate cause only, the carrier is entitled to claim exemption for a loss of which the act of God is the proximate cause. "It is said to be an ancient and universal rule, resting upon obvious reason and justice, that a wrongdoer²³⁴ shall be held responsible only for the proximate, and not for the remote, consequences of his actions: 2 Parsons on Contracts, 456. The rule is not limited to cases in which special damages arise; but is applicable to every case in which damage results from a contract violated or an injurious act committed: 2 Greenleaf's Evidence, sec. 256; 2 Parsons on Contracts, 457. And the liabilities of common carriers, like persons in other occupations and pursuits, are regulated and governed by it: Story on Bailments, 586; Angell on Carriers, 201; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695": *Denny v. New York Cent. R. R. Co.*, 79 Mass. 481, 74 Am. Dec. 645.

"A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss

by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused": *Memphis R. R. Co. v. Reeves*, 77 U. S. 176, 189, 19 L. ed. 909.

"A common carrier is protected from liability for the loss of property intrusted to it for transportation only when it is made to appear that the loss was occasioned by the act of God or the public enemy, or where the loss or damage results from some inherent quality or infirmity in the property itself. Against losses from all other causes the carrier is an insurer. For the prompt delivery of goods intrusted to its care for transportation it is held to the exercise of only ordinary care: *Gulf etc. Ry. Co. v. Levi*, 76 Tex. 337, 18 Am. St. Rep. 45, 13 S. W. 191, 18 L. R. A. 323. Inasmuch as it is undisputed that the loss of the cotton was occasioned by the storm of September 8, 1900, and as that catastrophe comes within the strictest definition of the act of God, it will serve to acquit the company of liability, unless it is made to appear that there is some causal connection recognized by law between the negligence of the company in failing to make timely delivery of the goods and their destruction by the storm, for we regard it as well settled that the doctrine of proximate cause is applicable to cases involving the loss of goods by a carrier, where responsibility must be predicated upon negligence of the carrier: Citing cases. What, then, is the true legal relation between the failure on the part of the company to make timely delivery of the cotton and its subsequent destruction by the storm? In ²³⁵ order to constitute proximate cause of an injury the injury must be the natural and probable result of the negligent act or omission: *Texas & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162. In the course of the opinion in the case just cited Chief Justice Gaines says further: 'Since every event is the result of a natural law, we apprehend the meaning is that the injury is such as may probably happen as the natural consequence of the negligence under the ordinary operation of natural laws.' Again, he says: 'It would seem that there is neither a legal nor a moral obligation to guard against what cannot be foreseen.' In applying the principle to such a state of facts as is presented by the case before us the courts have with remarkable uniformity held that in a legal sense there is no causal connection between the act of negligence and the destruction by

the act of God": *International & G. N. R. Co. v. Bergman* (Tex. Civ. App.), 64 S. W. 999.

"A common carrier, though guilty of negligent delay in transporting stock, is not liable for injury thereto inflicted by severe weather which overtook them in transit in consequence of the delay. The severe weather, and not the delay, is the proximate cause of the injury, and to this cause only does the law look. Severe weather is an act of God, for the consequences of which a common carrier is not liable": *Herring v. Chesapeake & W. R. Co.*, 101 Va. 778, 45 S. E. 322.

Cases are cited to the contrary, among which are the following: *Michaels v. New York Cent. R. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406 (see, however, *American Brewing Assn. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538, 42 S. W. 679); *Wald v. Pittsburg etc. R. R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332, 44 N. E. 888, 35 L. R. A. 356 (merely adopts the New York rule); *Cassilay v. Young*, 4 B. Mon. (Ky.) 265, 39 Am. Dec. 505 (no discussion of principles); *Alabama Great Southern R. R. Co. v. Quarles*, 145 Ala. 436, 117 Am. St. Rep. 54, 40 South. 120, 5 L. R. A., N. S., 867 (carrier's delay—destruction by cyclone); *Bibb Broom Corn Co. v. Atchison etc. Ry. Co.*, 94 Minn. 269, 110 Am. St. Rep. 361, 102 N. W. 709, 69 L. R. A. 238 509; *Green-Wheeler Shoe Co. v. Chicago etc. Ry. Co.*, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A., N. S., 882; *Wabash R. Co. v. Sharpe* (Neb.), 107 N. W. 758 (the last three are 1903 flood cases).

In the case of *Michaels v. New York Cent. R. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415, the opinion securing the adherence of the greater number of the members of the court was written by Mr. Justice Davies. His statement of principles is as follows: "The law is well settled that common carriers, while engaged in the transportation of goods for hire, are not responsible for injuries to them caused by an act of God or the public enemy. With the exception of injuries thus caused, they are liable for all damage to goods intrusted to them, while under their care and control. For the reasons stated in the opinion in the case of *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426, decided at this term, the carrier, to exempt himself, must show that he was free from fault at the time the injury or damage happened. He must show that he was without fault himself, and that no act or neg-

lect of his concurred in or contributed to the injury. If he has departed from the line of duty, and has violated his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury, then the carrier is not protected."

The same judge delivered the opinion in *Read v. Spaulding*, which purports to be based upon authority. The case of *Davis v. Garrett*, 6 Bing. (Eng.) 716, is its chief prop. That case was one of deviation, a positive misfeasance, which makes the carrier liable as for conversion: 6 Cyc. 383; *Chicago G. W. Ry. Co. v. Dunlap*, 71 Kan. 67, 80 Pac. 34. Mr. Chief Justice Tindal bases his argument upon the proposition that the wrong of the master in taking the barge out of its proper course was undoubtedly a ground of action. The rule first appears in the law of marine insurance, and was adopted to meet the spirit of dangerous adventure on the part of sea-rovers which disregarded the safety of both property and life. Such a tort-feasor is held to take all risks, as if they were actually foreseen, and is not allowed ²³⁷ to apportion or qualify his wrong. Mr. Justice Deaderick, in *Lamont v. Nashville & Chattanooga R. R.*, 9 Heisk. (Tenn.) 58, and Mr. Freeman, in volume 36 of the *American State Reports*, at page 839, have shown that none of the other cases cited sustains the contention that delay in starting goods to their destination will amount to such negligence as will make the carrier liable for a loss occasioned proximately by the act of God, and it is not necessary to review them here.

The only other support for the New York doctrine is that supplied by the academic method of settling the whole controversy by a definition. It is said to be "agreed" that there can be no loss by act of God without the total exclusion of all human agency. If there be any admixture of human means an injury cannot be the act of God: *Wright, J.*, in *Michaels v. New York Cent. R. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415. Therefore a carrier who in the course of tardy transportation brings goods in the pathway of a Johnstown flood or a San Francisco earthquake causes their destruction. The event having an admixture of human means is not the act of God. This, of course, is like playing with loaded dice. It is always possible to get the desired result in the conclusion of a syllogism if the proper material be put into the premises.

One of the cases cited by Mr. Justice Wright is that of *New Brunswick Steamboat Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394, which reviews others to which he refers. A wharf which the defendants were bound to keep safe was defective on account of a projecting timber. A violent storm produced a very low tide and drove a vessel against the timber, which pierced her side, causing her to fill and sink, to the damage of her cargo. It was held that the defect in the wharf was the proximate cause of the loss. In the syllabus of the case and throughout the opinion it is made plain that negligence on the part of the carrier must be such as to constitute a proximate ²³⁸ cause of the loss in order to render him liable, and that if the act of God be the proximate cause the carrier is excused. The following extract shows the court's view: "The argument for the defendants in this case is that inasmuch as, if there had not been an unusually low tide, produced by a violent storm of wind, the barge would not have struck the timber, therefore the loss must be attributed to the storm. But if that argument was sound it would follow that, if an unseaworthy vessel should founder in a storm, the fact that she might have gone safe if the weather had remained fair would excuse the carrier. This is not pretended to be the law. If the vessel be in fact unfit for her business, a loss arising from a storm is presumed to have been occasioned by the defect of the vessel, because it is impossible to say how far the defect contributed to the loss. Upon the like principle, if the carrier's dock be imperfect, a loss arising by the influence of a storm acting upon the imperfection, and which would not have happened in the absence of either cause, must be attributed to the imperfection. The loss is not by an act of God alone; it is produced partly by an act for which the carrier is responsible. Had there been no storm, but had the dock itself given way and sunk the vessel, or had a projecting timber before unnoticed or believed not to be dangerous occasioned the injury, since no act that could be called the act of God had intervened it is undeniable that the carriers would be liable. In this case an act of God did intervene, and was instrumental in producing the loss; but it was not the sole or proximate cause of the loss."

No one will dispute the soundness of this argument. It has been decided that if a carrier undertake to transport freight in an unseaworthy ship, it makes no difference that

the storm which foundered it was of unusual severity. Hazard existed when the voyage began, and it is not possible to determine the effect of the delinquency upon the final event: *Bell v. Reed*, 4 Binn. (Pa.) 127, 5 Am. Dec. 398. If baggage be put off in the rain without any protection, it makes no difference that the rainfall is unprecedented. It is the carrier's duty to protect property in its custody from exposure ²³⁹ to rain: *Sonneborn v. Southern Ry. Co.*, 65 S. C. 502, 44 S. E. 77. In all such cases, and in cases of actual deviation from the usual route, it is proper to say that an act of God must not combine with human instrumentality, that if a carrier depart from the line of duty he is liable, though an act of God intervene, and that he must be free from fault in order to claim his exemption. But to apply such statements to cases of mere delay in forwarding is to make the carrier liable, in the phrase of Mr. Chief Justice Gibson, for negligence in the abstract and not for the consequences of negligence: *Hart v. Allen*, 2 Watts (Pa.), 114.

In the decision just cited the same distinguished judge has shown that cases of this character are not within the reason or spirit of the rule holding common carriers liable as insurers, and hence that there is no excuse for not applying to them the doctrine of proximate cause: "A carrier is answerable for the consequences of negligence, not the abstract existence of it. Where the goods have arrived safe no action lies against him for an intervening but inconsequential act of carelessness, nor can it be set up as a defense against payment of the freight; and for this plain reason: That the risk from it was all his own. Why, then, should it in any other case subject him to a loss which it did not contribute to produce, or give an advantage to one who was not prejudiced by it? It would require much to reconcile to any principle of policy or justice a measure of responsibility which would cast the burthen of the loss on a carrier whose wagon had been snatched away by a whirlwind in crossing a bridge, merely because it had not been furnished with a proper cover or tilt to protect the goods from the weather. Yet the omission to provide such a cover would be gross negligence, but, like that imputed to the carrier in the case before us, such as could have had no imaginable effect on the event. A carrier is an insurer against all losses without regard to degrees of negligence in the production of them, except such as have been caused by an act of providence or the common enemy;

and why is he so? Undoubtedly to subserve the purposes, not of justice in ²⁴⁰ the particular instance, but of policy and convenience—of policy, by removing from him all temptation to confederate with robbers or thieves, and of convenience, by relieving the owner of the goods from the necessity of proving actual negligence, which, the fact being peculiarly within the knowledge of the carrier or his servants, could seldom be done: Jones on Bailment, 108, 109; 2 Kent's Commentaries, 59, 78. Such are the rule and reason of it, and such is the exception. But we should enlarge the rule, or to speak more properly, narrow the exception far beyond the exigencies of policy or convenience, did we hold him an insurer against even the acts of providence as a punishment for an abstract delinquency, where there was no room for the existence of a confederacy or the operation of actual negligence; and to carry a responsibility, founded in no principle of natural equity, beyond the requirements of necessity, would be gratuitous injustice": Hart v. Allen, 2 Watts (Pa.), 114.

Of the recent cases holding the carrier liable, Bibb Broom Corn Co. v. Atchison etc. Ry. Co., 94 Minn. 269, 110 Am. St. Rep. 361, 102 N. W. 709, 69 L. R. A. 509, adds nothing to the New York doctrine, unless it be by such captious statements as that the exemption from liability of the carrier who is guilty of mere delay "is based on too strict an application of the rule of proximate cause," and that the reasons for such exemption "lose their force and persuasive powers when applied to a carrier who violates his contract, and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen."

The case of Green-Wheeler Shoe Co. v. Chicago etc. Ry. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A., N. S., 882, contains the following remarkable statement as a new contribution to the law: "Now, while it is true that defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have ²⁴¹ been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time

during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper."

This principle either makes the carrier responsible upon its hindsight rather than its foresight, or makes it bound to regulate its conduct with reference to that which is utterly beyond mortal ken.

The commissioners' decision in the case of *Wabash R. Co. v. Sharpe* (Neb.), 107 N. W. 758, contents itself with citing without discussion the two cases in 30 N. Y., a dictum in *McClary v. Sioux City etc. R. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631, and *Lowe v. Moss*, 12 Ill. 477, which did not involve an act of God at all.

The Alabama case, *Alabama Great Southern R. R. Co. v. Quarles & Couturie*, 145 Ala. 436, 117 Am. St. Rep. 54, 40 South. 120, 5 L. R. A., N. S., 867, sticks in the bark of the carrier's liability as an insurer, and ignores the justice and policy of disregarding all except the proximate cause.

The recent Missouri cases arising from the flood of 1903 all hold the carrier free from actionable fault. In *Grier v. St. Louis etc. R. R.*, 108 Mo. App. 565, 84 S. W. 158, after citing the leading cases in support of his view, Judge Goode says: "In all those decisions it appeared the carrier had been guilty of some delay in moving the property, but for which it would not have been where the catastrophe occurred and therefore would have escaped injury. But as the catastrophe happened unexpectedly, and was not within the range of reasonable foresight, the negligent delay was not indulged while the carrier realized there was peril to the property and, therefore, did not participate, as a concurrent cause, in bringing about the loss. The doctrine of the cases cited on this point by the appellant is one that pervades the law of negligence; and by virtue of it a common carrier's neglect, like any other party's, must enter as a proximate cause ²⁴² into the happening of an injurious accident, to entail liability."

In *Moffatt Commission Co. v. St. Louis etc. R. R. Co.*, 113 Mo. App. 544, 88 S. W. 117, Judge Ellison discusses the question upon principle and in the light of the authorities. The following quotations from his opinion are pertinent:

"It might be negligence to delay putting certain goods under shelter in the month of July to protect them from

rain or thieves; but if left out, and the unheard-of occurrence (in this climate) of a freeze at that season was to occur and destroy them, could there be any natural connection between the neglect and the loss? If a train should for two hours be negligently delayed in leaving a station, and meantime a storm should arise and lightning strike a car and destroy property, the carrier would not be liable. The result would be beyond natural expectation, not within the thought or foresight of anyone, altogether fortuitous and disconnected from the negligent act of delay.

“So, the rule may be stated to be this: the act of God must be the sole cause of the loss or injury; and whenever the negligence of the carrier mingles with the act of God as a co-operative cause, he is liable, provided the resulting loss is within the probable consequences of the negligent act; otherwise, it will be too remote and disconnected to be considered the proximate cause.”

In *Elam v. St. Louis etc. R. Co.* (Mo. App.), 93 S. W. 851, Judge Johnson followed Judge Ellison and said: “In the exercise of reasonable care, of which negligence is the antonym, human foresight and prudence cannot foresee and guard against the sudden, unheralded, and overwhelmingly powerful outbursts of natural forces, and, because neither time, place nor destructive power of such visitations may be anticipated, people cannot be expected to act with reference to them; and, therefore, negligence which by chance places persons or property within their destructive reach should not be deemed a co-operative cause of injury.”

This court is of the opinion that the negligent delay of a carrier in moving goods intrusted to it for transportation, ²⁴³ not so unreasonable as to amount to a conversion, will not render it liable for the loss of such goods after they have been carried to their destination if they are there destroyed by an act of God before delivery.

The record recites that the facts of this case were all proved by uncontradicted testimony. There being no questions of credibility to be settled, and no conflicts of evidence to be resolved, the solution of the matter depended entirely upon the rule of law to be applied, and the court properly instructed a verdict for the defendant.

The action was not founded upon sections 5982 and 5993 of the General Statutes of 1901. They merely give statutory

damages for delay, and, if applicable to interstate shipments, do not govern the case made by the petition.

The judgment of the district court is affirmed.

For Authorities on the Question Involved in the Principal Case, see Alabama Great Southern R. R. Co. v. Quarles, 145 Ala. 436, 117 Am. St. Rep. 54, and cases cited in the cross-reference note thereto.

McKELVEY v. McKELVEY.

[75 Kan. 325, 89 Pac. 663.]

HUSBAND AND WIFE—Interest of Nonresident Wife in Husband's Land.—As to lands of a married man, his wife, whether resident or nonresident, has a present interest, under a statute declaring that, on the death of a husband, one-half of any lands in which he has an interest shall, under the direction of the probate court, be set aside by the executor as her property in fee simple, provided that she shall not be entitled to any interest in any land which he has conveyed, when she was not, and never has been, a resident of the state, and the wife may protect such interest by appropriate action during the life of the husband as against his wrongful acts. (pp. 437, 438.)

HUSBAND AND WIFE, Recovery by Her of Lands Which He Fraudulently Disposed of.—As the interest of a wife in her husband's lands does not come to her by inheritance, it is not a bar to her recovery that he parted with his title in such a fraudulent manner that neither he nor his heirs can recover it. (p. 438.)

HUSBAND AND WIFE—Fraudulent Execution Sales, Effect of upon Her Interest.—Though the statute provides that the wife has no interest in lands of her husband which had been sold at execution or judicial sale, it contemplates such execution or judicial sales as become necessary to pay his debts, and not fraudulent or collusive sales having no other object than to fraudulently defeat her title. (p. 438.)

ALL FRAUDULENT JUDICIAL or Execution Sales are void as against any party having a vested interest in the property and those in collusion with or participating in the fraudulent transaction. (p. 438.)

FRAUDULENT TRANSFER—Rejection of Evidence Showing that Conveyance was Made without Consideration.—In an action by a wife to recover her interest in lands which she claims were subjected to a fraudulent execution sale for the purpose of divesting her interest, it is reversible error to sustain an objection to a question to the purchaser at the sale asking him whether he paid the consideration named in the deed. (p. 439.)

HUSBAND AND WIFE, Her Right to Maintain an Action for Her Interest in His Lands.—Notwithstanding the interest which the wife has in the lands of her husband, she cannot, in his lifetime, maintain ejectment or partition for such interest. (p. 440.)

LIMITATIONS—Action of Widow to Recover Her Interest in Her Husband's Lands.—If a husband and others institute a proceeding to divest the interest of his wife by a fraudulent execution or judicial sale, and his lands are sold and conveyed pursuant to such sale, her right to maintain ejectment for her interest does not accrue until his death, and hence possession held adversely to her under such sale during his lifetime is not to be considered. (p. 440.)

Suit for the partition of a tract of land and to set aside certain proceedings under which it was claimed by the defendants. The plaintiff was the widow of John C. McKelvey, who died in August, 1903, having become the owner of the property during their coverture and while they lived in Illinois. The plaintiff never resided in Kansas. In 1883, the decedent was the owner of the land, and he and his son, the defendant, went to Kansas, and the complainant alleged that they and James Bell fraudulently and collusively entered into a conspiracy to defraud the plaintiff of her interest, and for that purpose the decedent executed a promissory note to Agnus Bauermond, a fictitious person, and delivered it to Bell, with instructions to him to commence an action thereon, which he did, and obtained a judgment and bought in the property at an execution sale thereunder; that no consideration was paid for it or at the execution sale, and Bell, after receiving a conveyance, conveyed the same property to the defendant John A. McKelvey.

The defendant filed a general denial and also pleaded the judgment and sale thereunder, the conveyance to Bell, the acquisition of the title of his brother and sister, and the open, notorious and exclusive possession under a claim of ownership for more than fifteen years, and the making of lasting and valuable improvements, and the statute of limitations. Judgment for the defendants, and the plaintiff appealed.

I. O. Pickering and H. Clay Horner, for the plaintiff in error.

Ogg & Scott, for the defendant in error.

328 GREENE, J. Before examining the errors assigned it should be ascertained whether the plaintiff ever had any interest in the land in controversy, and, if so, the nature of such interest, and whether it was barred by the statute of limitations. If the facts stated in her petition disclose that she never had any interest in the land, or that her cause of

action was barred by the statute of limitations, no errors committed on the trial could be prejudicial to her.

Upon the first question here suggested it is contended that under our statute a nonresident wife had no interest in the real estate of her husband situated in Kansas, and therefore that it was impossible for plaintiff's husband and the defendant to commit a fraud upon her right by any act with reference to such real estate. Our statute provides: "One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee simple, upon the death of the husband, if she survives him; provided, that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not, or never has been, a resident of this state": Gen. Stats. 1901, sec. 2510.

This statute does not discriminate against a nonresident wife in favor of a resident wife as to the interest the former shall have in the real estate of her husband situated in Kansas. It excludes her from any interest in any lands owned by the husband of which he has made a conveyance, when the wife at the time of the conveyance is not or never has been a resident of the state, and it excludes both the resident and nonresident ³²⁹ wife from any interest in any lands which have been sold on execution or other judicial sale. But as to lands not thus disposed of, and not necessary for the payment of his debts at the time of his death, the interest of the nonresident wife is equal to that of the resident wife. The interest which the statute gives to the wife in the real estate of her husband during his life is not easily classified or defined. Because of this difficulty it has been thought by some to be in its nature an inheritance, and such a suggestion may be found in some of the opinions of this court. But practically the entire trend of the decisions of this court is to treat it as a present existing interest—one which the wife may protect by an appropriate action during the life of the husband and against his wrongful acts: *Busenbark v.*

Busenbark, 33 Kan. 572, 7 Pac. 245; Flanigan v. Waters, 57 Kan. 18, 45 Pac. 56.

The wife's interest does not depend for its inception upon the death of the husband, as an inheritance would, but springs into existence by operation of law upon a concurrence of seisin and the marriage relation. This interest, equal to one-half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, and which the husband had not conveyed at a time when his wife was not, or never had been a resident of this state, and not necessary for the payment of his debts, upon the death of the husband shall, under the direction of the probate court, be set apart by the executor as her property. And the only control exercised by the probate court or the executor or administrator over the wife's interest in the real estate owned by her husband at the time of his death is to ascertain its value and set it apart to the widow—not as an heir of her deceased husband, but as her separate and absolute property in fee simple. And since this interest does not come to her by inheritance, it is not a bar to her recovery that her husband ³³⁰ parted with his title in such a fraudulent manner that neither he nor his heirs can recover it.

This section, as observed, excludes the wife from any interest in lands which have been sold on execution or other judicial sale. It is contended that this land was sold under execution sale and that the defendant holds his title through such sale. The statute contemplates only such execution and judicial sales as have become necessary for the payment of the debts of the husband. It does not contemplate collusive and fraudulent execution or judicial sales to which the husband is a party and which have no other object than to divest the husband of his title for the fraudulent purpose of depriving the wife of her interest in such property. All fraudulent judicial or execution sales are void as between one not a party but having a vested interest in the res and those in collusion with or participating in the fraudulent transaction. The title to the real estate in controversy is claimed by one who it is alleged was a party to the fraudulent proceedings which divested the title of John C. McKelvey. If the proceedings were collusive and fraudulent, such a sale did not have the effect, at least as between the

plaintiff and those who were parties to the fraud, of defeating her interest in the land.

The principal question litigated in the trial court was whether the judgment and the proceedings by means of which the title of John C. McKelvey to the lands in controversy became divested and the title thereto vested in the defendant, John A. McKelvey, were collusive and fraudulent. The court made special findings that they were not.

Upon the trial the plaintiff, for the purpose of upholding her contention that such proceedings were fraudulent, and wanting in consideration, while the defendant was upon the witness-stand and under cross-examination, asked him this question: "I will ask you to state to the court whether when ~~231~~ that deed [being the deed from Bell to the defendant] was delivered to you on the third day of January, 1884, you paid to Doctor Bell the sum of eight thousand dollars."

An objection was sustained to this question. This is alleged as error. It was an attempt to elicit information upon one of the controverted points—the want of any consideration passing from the defendant to Bell for the deed to the land. The deed purports to have been executed for a consideration of eight thousand dollars, and the ruling of the court excluded the plaintiff from inquiring into the actual consideration. This error appears more pronounced in view of the evidence of the defendant that when he came to Kansas, in 1883, less than a year before the deed was executed, all the property he owned was a one-half interest in a butcher-shop, the total value of which was about three hundred and fifty dollars, and the finding of the court "that when John A. McKelvey came to Kansas in 1883 he did not have to exceed one hundred and fifty dollars, and that he had not received any money or property by inheritance from anyone." Under the pleadings the plaintiff should have been granted the greatest liberty in the examination and cross-examination of all the parties alleged to have been connected with the passing of this title, which she claimed was obtained by collusion and fraud. The ruling of the court deprived her of a substantial right.

While a decision of the question raised by the second defense is not necessary to the present disposition of the case in this court, it will become important in a retrial of the cause, and for this reason we feel called upon to pass upon it. The contention is that the defendant has for more than

fifteen years been in the open, exclusive and adverse possession of the land, claiming it as his own, under color of title, and that if the plaintiff ever had any rights thereto her right of action is barred by the statute of limitations. In this contention it is assumed that the plaintiff's right of action accrued when the execution sale passed the ³³² title from her husband. While it has been held in this state that the wife may, during the lifetime of her husband, institute some proceedings to protect her interest in her husband's real estate, as in the Busenbark case, *supra*, all remedies are not open to her during the life of her husband, and the remedy pursued by the wife in this case is one of those she was not entitled to invoke during the lifetime of her husband. Notwithstanding the interest of the wife in the real estate of her husband, during his lifetime she may not maintain ejectment or partition for such interest. It is only upon his death that her right of action in ejectment accrues to her. This suit was commenced within two years after the death of the husband; therefore, it was not barred by any statute of limitation.

The judgment is reversed and the cause remanded.

Johnston, C. J., Burch, Mason, Porter, and Graves, JJ., concurring.

SMITH, J., Concurring Specially. I concur in the decision of this case for the following reasons: It is admitted that plaintiff was the wife of John C. McKelvey at and long prior to his death, and while such relation existed he was seised of the land in question and made no conveyance of it. To the claim that it was sold during his lifetime on an execution to satisfy a judgment for money rendered against him, Mrs. McKelvey offered evidence impeaching the consideration claimed to have been paid for the transfer of the land to the son, John A. McKelvey. This evidence tended to establish one circumstance in a chain which strongly indicated that the judgment was collusive, fraudulent and void. The evidence was very material, for if the judgment was void the execution was also void and the plaintiff should recover. For this error I concur in the decision.

I am unable to concur in the language of the second paragraph of the syllabus or in some statements in the ³³³ opinion. It is said that the interest of a wife in the lands of her husband "springs into existence by operation of law upon

a concurrence of seisin and the marriage relation." If this be true, this suit was long ago barred by the statute of limitations. Coverture is no disability in this state. A married woman may sue and be sued in the same manner as if she were unmarried. If the land was sold under a void judicial proceeding, and she had a present interest therein which was invaded, she could and should have proceeded to have the sale set aside within the limitation provided by law. If, however, as I think, her rights sprang into existence on the death of her husband, then her action is not barred but is timely.

The wife's right to prevent the fraudulent disposition of her husband's land is based upon her legal right to look to it for her maintenance, which, as is shown by the petition in the case of *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245, was pleaded in that case, and no other right appears to have been asserted nor any other question to have been presented for decision.

The statutory right of a wife to an estate in her husband's land is not consummated until his death. Until then she has no right of possession and she cannot sell it. It can be taken from her in an action to which she is not a party—that is, without due process of law. If she die before her husband no right or interest therein descends to her heirs. In all its uncertainty and contingency it is entirely analogous to dower. As to devolving an estate it is analogous to heirship.

"Dower is not an estate in land, vested or otherwise. It is a right without value, unless by some modern methods a possibility may be valued. A possibility or contingency is not an estate. It may be affirmed generally, where a right is given by law, until that right becomes vested in some way in property the law may be changed or repealed, and the right taken away. . . . Dower does not become a vested right in the ³³⁴ wife until the death of her husband. A possibility of dower is no vested right in the estate of dower or anything the law recognizes as property": *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209, 211, 4 C. C. A. 290.

A married woman who survives her husband either has or has not a vested property right, prior to his death, in the land owned by him at any time during the continuance of the marriage relation. If she has such vested property right at such time, coverture being no disability, she has an im-

mediate cause of action when such right is invaded, and may bring her action at once to repel such invasion. Since she may bring her action at once, she must bring it within the time limit provided by statute or be forever barred from the remedy.

If the wife has no vested property right in her husband's land prior to his death, she certainly is vested by the statute with such right, immediately upon his death, in all his lands which have not theretofore been alienated in some one of the manners specified in the statute; and if, by fraud or otherwise, a cloud has been cast upon her title to her interest in such lands by an apparent, not real, alienage of the same before the death of the husband, she may bring an action at any time after his death, within the statutory limitation, to remove such cloud.

With Respect to Her Marital Rights, the law affords the same protection to a wife as to a creditor of her husband. She is within the protection of the statute against conveyances made with intent to defraud; and if a conveyance is purely voluntary, it is not necessary that the grantee participate in the intent of the grantor: *Higgins v. Higgins*, 219 Ill. 146, 109 Am. St. Rep. 316.

WHITNEY v. MASEMORE.

[75 Kan. 522, 89 Pac. 914.]

A JUDGMENT Based on the Publication of a Summons against — Whitney and — Whitney, his wife, whose first names are unknown, entered against Florence I. Whitney, an unmarried woman, is void as against her, and may for that reason be set aside on motion made more than three years after its entry, though after the publication, the complaint was amended without notice by inserting her full and true name therein. (p. 445.)

Whitcomb & Hamilton and R. S. Cone, for the plaintiff in error.

George J. Downer, for the defendant in error.

⁵²² **GREENE**, J. Frank N. Masemore commenced this suit to quiet his title to certain lands. There were several defendants. Among others named were "— Whitney, and — Whitney, her husband." The allegations in the petition referred to these parties as "— Whitney, and — Whitney, her husband," whose real names the plaintiff was

unable to ascertain. An attempt was made to get service of summons by publication. In the affidavit therefor they were described as "—— Whitney, and —— Whitney, his wife, whose first names are unknown." In the notice of publication they were referred to as "—— Whitney and —— Whitney, his wife, whose first names are unknown." After this notice had been published, the plaintiff, without notice, amended his petition, both in the title and body, by inserting the name ⁵²³ "Florence I." before the name "Whitney" that referred to the wife.

Thereafter, and on June 3, 1902, judgment was rendered against Florence "I." Whitney and others, by which it was adjudged that the plaintiff's title to the real estate was valid and perfect, and that the defendants had no estate or interest herein. On January 26, 1906, Florence D. Whitney filed a motion to set aside the judgment rendered against her on June 3, 1902, as to one of the quarter sections of the land described in the petition, claiming that the record showed that no service of summons was ever made personally or by publication upon her, that she had made no appearance in the suit, and that she had no notice or knowledge of the same until long after the rendition of the judgment. This motion was supported by her affidavit, in which she stated that she was and had been for more than five years last past an unmarried woman; that she claimed an interest in the quarter section of land therein described, being one of the quarters described in plaintiff's petition; and that she had no knowledge or notice of such action or the pendency thereof or the rendition of the judgment until long after the same was entered. It was admitted by the plaintiff that the statements contained in Florence D. Whitney's affidavit were true. Upon a hearing the motion was denied. The only question for our consideration is whether a judgment rendered against Florence D. Whitney on such service is void.

The provision of our statute with reference to service of summons by publication provides that the notice published shall contain "the names of the parties": Gen. Stats. 1901, sec. 4508. If the Christian names of the defendants are unknown to the plaintiff he ought to give such description or identification of them in the notice that the defendants and persons acquainted with them would by reading the notice know who were being sued. The notice "must be

given with ⁵²⁴ sufficient accuracy clearly to indicate their identity": 17 Ency. of Pl. & Pr. 90.

The notice given by the plaintiff in this case did not identify Florence D. Whitney. There were no statements or intimations that would indicate to her or any other person who read the notice that she was intended as one of the defendants. Indeed, she might very reasonably have concluded from reading the notice that she was not the Whitney for whom the notice was intended. All effort made to identify her was misleading. The description was "—— Whitney, and —— Whitney, his wife, whose first names are unknown." At the time this notice was published Florence D. Whitney was an unmarried woman. In *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211, it was said: "Notice, by publication, to John McCorkle, and —— McCorkle, his wife, of the pendency of an action to quiet title to real estate, which was instituted after the death of said John McCorkle, is not notice to Maria McCorkle, widow of said John McCorkle; and that being the only attempt to bring her into the action, and service of process not being waived by her, she not appearing to the action, and, in fact, having no knowledge of the pendency of the action, and being before, at the time of, and since the institution of the action, a resident of the state, but not of the county where the action was instituted, the court obtained no jurisdiction over her, and the judgment rendered therein was a nullity as to her."

In the case of *Fanning v. Krapfl*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293, a suit to foreclose a mechanic's lien, where the service was by publication, the defendant's name was T. Phelia Boyd Hopkins. In the publication notice the name was P. T. B. Hopkins. It was held that the transposing of the initials made the notice of no effect as to her, and gave the court no jurisdiction to render a decree against her. It was well said in that case: "Notice by publication, even where there is no misnomer, does not afford a very strong natural presumption ⁵²⁵ that the fact of the pendency of the action will be brought to the defendant's actual knowledge. Notice by this mode is allowable only out of necessity. It must often happen that great injustice is done and great hardship suffered. We are not disposed to open the door any wider than necessity requires."

Service of summons by publication is only a substitute for personal service, and the statute providing for such service should be construed with considerable strictness. It is always doubtful if the defendant will ever by seeing the notice in the paper know of the pendency of the action until after judgment has been rendered. The information that an action is pending is quite often conveyed to the defendant by his acquaintances who have read the notice, when without the information thus conveyed the defendant would not have received any notice. The notice, therefore, should so clearly identify the defendant that his acquaintances who read the notice will know for whom it was intended. It is not probable that a nonresident of the state will see the local paper containing the notice, but it is always possible that some of his acquaintances residing in the county where the paper is published will see it, and if the defendant is identified in the notice they are likely to convey the information to him. A notice that does not furnish this information is ineffectual to give the court jurisdiction of the defendant. The notice published was so defective in describing the plaintiff in error that it did not give the court jurisdiction of her, and the judgment entered is void as to her.

It is argued by defendant in error that he followed the provisions of section 4577 of the General Statutes of 1901. That section has application only where personal service is made.

The order denying the motion to vacate the judgment is reversed and the cause remanded, with instructions to allow the motion and set aside the judgment as to Florence D. Whitney.

Defects in the Service of Process as affecting jurisdiction are discussed in the note to *Sanford v. Edwards*, 61 Am. St. Rep. 485. It has been decided that service by publication addressed to "Etta R. Fisher and — Fisher, her husband," is valid on collateral attack: *Cruzen v. Stephens*, 123 Mo. 337, 45 Am. St. Rep. 549. But it has been held that service by publication addressed to "John McCorkle and — McCorkle, his wife," he being then deceased, is no notice to her of the pendency of the action: *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334. A citation to "Mary E. Robinson," defendant's maiden name, does not give the court jurisdiction to render judgment against "Mary E. Freeman," the name that defendant acquired by marriage: *Freeman v. Hawkins*, 77 Tex. 498, 19 Am. St. Rep. 769.

HORNER v. ELLIS.

[75 Kan. 675, 90 Pac. 275.]

A JUDGMENT for the Specific Performance of a Contract is not Void, though the complaint fails to state a good cause of action, where it does state sufficient matter to direct the attention of the court to its merits. (p. 447.)

PLACE OF TRIAL of Actions for Specific Performance.—A suit for specific performance is personal in its nature, and, therefore, must be tried in the county where the defendant resides, though the land which is the subject of the action is located in a different county. (p. 447.)

EJECTMENT.—A Tenant in Common is Entitled to Recover Possession of the Whole Premises against a defendant who is in possession of the land, but has no title thereto other than liens for taxes paid. (p. 448.)

C. W. Fairchild, for the plaintiffs in error.

William Barrett and R. F. Crick, for the defendant in error.

⁶⁷⁵ **SMITH, J.** This action in ejectment was brought in the district court of Pratt county by A. W. Ellis against A. M. Horner and Daisy M. Hutto to recover possession of one hundred and sixty acres of land in that county. The case was tried by the court, without a jury. Judgment was rendered in favor of the plaintiff, subject to the payment of a tax lien, and the defendants bring the case here for review.

The land in question was patented by the United States to William H. Albright, who, when he was advanced in years and without wife or child, made an ⁶⁷⁶ agreement with his niece, Emily Irene Knowlton, as she alleged in her suit against his heirs for specific performance of the contract, that if she would go with him to a hospital, where he was going for an operation, and would nurse him and live with him and take care of him till he died, he would give her the land in question; that he told her he had already executed and delivered a deed of the land to a man in Pratt county, with instructions to deliver it to her upon receipt of information that he was dead. She also alleged that her uncle died without making the transfer, and pleaded fully the execution of the contract on her part. The petition did not disclose whether this contract was oral or in writing, and did not allege that the plaintiff went into possession of the land

under the contract or that she made any improvements thereon.

Probably this petition did not state facts sufficient to constitute an equitable cause of action for specific performance of the contract: *Baldwin v. Squier*, 31 Kan. 283, 1 Pac. 591. But even if it did not, it does not follow that the judgment rendered thereon is void, or that it is by reason thereof subject to collateral attack. The petition does contain sufficient matter to challenge the attention of the court to its merits, and therefore the judgment is not void: See *Rowe v. Palmer*, 29 Kan. 337; *Head v. Daniels*, 38 Kan. 1. 15 Pac. 911.

The service in the Knowlton case was personal upon Mrs. Fowler (one of the heirs) and her husband in Pratt county; and, the other defendants being nonresidents of the state of Kansas, an attempt was made to get service upon them by publication. No one appeared, and judgment was rendered against all the heirs as upon default.

There was no element of trust between Albright and his niece, Knowlton, and under the decision in *Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891, the court acquired no jurisdiction of the persons of the defendants, ⁶⁷⁷ except by personal service. In that case it was said: "An action to compel the specific performance of an agreement to convey land, if the defendant's obligation is in contract merely, without any element of trust, is an action in personam, and must be brought in the county where the defendant resides, and not of necessity in the county where the land is situated": See, also, Gen. Stats. 1901, secs. 4476, 4477.

This was the law of this state at the time the Knowlton suit for specific performance was brought and determined and until the enactment of chapter 384 of the Laws of 1903. Mrs. Fowler, who with her husband was personally served with summons, resided in Pratt county, and she was a sister and heir of W. H. Albright, the patentee. Emily Irene Knowlton's mother was also a sister of Albright, and died before his decease, so Miss Knowlton was also an heir to the estate. By the judgment she acquired the moiety of title inherited by Mrs. Fowler, and afterward conveyed all her interest in the land to O. H. Bock, who, in turn, conveyed it to A. W. Ellis, the plaintiff.

After she was stripped of any title to the land by the judgment Mrs. Fowler obtained a tax deed to the land and sold and conveyed all her rights therein to A. M. Horner, who

afterward brought an action to quiet title to this and several other tracts of land and made W. H. Albright a party defendant, and attempted to get service upon him by publication. That action was brought and the publication was made, however, some years after the death of W. H. Albright, and, of course, Horner's title to the land in question was not strengthened thereby. Thereafter Horner and wife conveyed their interest in the land to their daughter, Daisy M. Hutto, whose title rests solely upon the tax deed to Mrs. Fowler. The court held this tax deed voidable and set it aside, awarding Mrs. Hutto a lien for the taxes paid. Of this decision no complaint is made.

The judgment of the court below, then, rests upon ⁶⁷⁸ the question whether Ellis, as a tenant in common with the heirs of W. H. Albright, other than Mrs. Fowler and Miss Knowlton, is entitled to recover the possession of the land against a defendant who had no title thereto, but was in possession and entitled to a lien thereon for taxes paid. We answer this question in the affirmative. In this state the question in ejectment is, Who has the superior title? *Hollenback v. Ess*, 31 Kan. 87, 88, 1 Pac. 275. A cotenant may recover the whole property against one who has no title: *Newman v. Bank of California*, 80 Cal. 368, 13 Am. St. Rep. 169, 22 Pac. 261, 5 L. R. A. 467; *Chapman v. Quinn*, 56 Cal. 266; *Quinn v. Chapman*, 111 U. S. 445, 4 Sup. Ct. Rep. 508, 28 L. ed. 476; *Duffey v. Rafferty*, 15 Kan. 9; *Simpson v. Boring*, 16 Kan. 248.

The judgment is affirmed.

Specific Performance of a contract to convey lands situated in another state may be decreed against a resident duly served: *Newton v. Bronson*, 13 N. Y. 587, 65 Am. Dec. 89; *Johnson v. Kimbro*, 3 Head, 557, 75 Am. Dec. 781; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621. See, too, *Idaho Gold Min. Co. v. Winchell*, 6 Idaho, 729, 92 Am. St. Rep. 290.

A Cotenant may Recover in Ejectment the whole of the common property as against one in possession without title: *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771; note to *Marshall v. Palmer*, 50 Am. St. Rep. 842. Some authorities, however, would limit his recovery to his undivided interest in the premises: *Williams v. Coal Creek Min. etc. Co.*, 115 Am. St. Rep. 578; *Baker v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540.

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CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

JOHNSON v. JOHNSON'S COMMITTEE.

[122 Ky. 13, 90 S. W. 964.]

WITNESS.—In an Action by a Divorced Wife against her former husband to recover possession of a note, neither is competent to testify whether it was given for money expended or services performed by him for her. (p. 450.)

CONTRACT—Transaction to Facilitate Divorce.—An agreement by a wife to confirm a gift of a note to her husband if he will not oppose her action for a divorce is void, and does not affect her right to recover the note or the amount of it. (p. 450.)

MARRIAGE AND DIVORCE—Right of Husband to Wife's Choses.—The fact that a husband reduces to his possession a note belonging to his wife gives him no property rights in it, and the fact that he disposes of it before she obtains a divorce does not prevent her from thereafter recovering it or its equivalent from him. (p. 452.)

E. H. Gaither, for the appellant.

W. L. Whittinghill, for the appellee.

¹⁴ **PAYNTER, J.** Appellant, G. J. Johnson, and Mary M. Johnson were married in 1897. They lived together as man and wife until 1899, when Mrs. Johnson went to the state of Kansas, where she remained for a year, when she instituted a suit against appellant in a court of Kansas for divorce from the bonds of matrimony. An order seems to have been entered granting the divorce. The parties continued to live apart. There was some question as to the validity of the divorce granted by the Kansas court, and appellant instituted an action in the Jessamine circuit court against the appellee for a divorce from the bonds of matri-

mony on the ground of abandonment. A judgment of divorce was entered. In the judgment a recitation was made as follows: "Both plaintiff and defendant are hereby restored to all property rights possessed by each of them before their marriage." Subsequently this suit was instituted by appellee, Mary M. Johnson, against ¹⁵ the appellant, to recover the possession of a note for eight hundred dollars and interest, and by an amended petition she asked that, in the event the note could not be recovered, she be given judgment against the appellant for the amount of the note and interest. Before the appellee left for Kansas, she loaned a man by the name of Foster eight hundred dollars, for which he executed a note to her. Subsequently appellant surrendered to Foster the note which he had given to the wife, and had another note executed to himself by Foster for the eight hundred dollars in lieu of the surrendered note. Appellant resists the appellee's right to recover upon the grounds (1) that the wife gave the note which Foster had executed to her to him for money which he had expended on her property, and for labor performed in looking after it for her; (2) that after the wife instituted the suit in Kansas for divorce he threatened to make a defense to the action, unless she confirmed the gift of the note previously made to him; and (3) that as he had disposed of the note which had been executed by Foster to her, and thus converted it to his own use before the judgment of divorce in the Jessamine circuit court, no cause of action exists in favor of appellee growing out of the transaction.

Appellant testified that the note was given to him by her for the money expended and labor performed, as stated. The wife denies this transaction (the testimony of each was incompetent: *Buckel v. Smith's Admr.*, 26 Ky. Law Rep. 494, 82 S. W. 235), and introduced some considerable testimony tending to show that appellant did not perform the labor nor expend the money on her property in Jessamine county, as claimed by him. We are of the opinion that he fails ¹⁶ to establish that the note was given to him for the consideration claimed by him.

The court sustained a demurrer to that paragraph of defendant's answer in which he pleaded that she gave him the note to induce him not to interpose a defense to the action in Kansas. We are of the opinion that the court did not err in sustaining the demurrer. The facts, as detailed,

did not constitute a good consideration. Such an agreement was against public policy. From the averments in the pleading the gift was not, as a matter of fact, an adjustment of property rights, but simply an inducement to forbear to interpose a defense to the action for divorce, which, he states, would have prevented her from obtaining it.

It is urged by counsel for appellant that, if the transaction is against public policy, then the law will leave the parties where they were found; that equity will not relieve either party from such a transaction. The facts averred do not make a case for the application of that principle of equity. It was simply a void contract. If, at the time the contract was made, the appellee was entitled to recover the note or the amount of it, her cause of action was not destroyed by reason of that agreement. It being void, it left the parties with rights as fixed by law.

As we have said, it is insisted that, under the judgment of divorce in the Jessamine circuit court, it simply restored to the parties the property rights possessed by each of them before their marriage, and that the plaintiff is not entitled to recover the note or the amount of it. The language of the judgment does not conform to the requirements of section 425 of the Civil Code of Practice. That section reads as follows: "Every ¹⁷ judgment for a divorce from the bond of matrimony shall contain an order restoring any property, not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other had failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing." This section of the code was enacted at a time when the husband was entitled to the personal property of his wife, providing he reduced it to his possession. Under this section of the code property was not to be restored which had been disposed of at the commencement of the action. Since the enactment of this section of the code the legislature has enacted statutes regulating the rights of husbands and wives in each other's property entirely different from the statute

which was in force at the time of the adoption of the code, from which we have quoted, section 425.

Section 2127 of the Kentucky Statutes of 1903 reads as follows: "Marriage shall give to the husband, during the life of the wife, no estate or interest in the wife's property, real or personal, owned at the time or acquired after the marriage. During the existence of the marriage relation the wife shall hold and own all her estate to her separate and exclusive use, and free from the debts, liabilities or control of her husband. No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability,¹⁸ upon a contract made after marriage, to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance; but her estate shall be liable for her debts and responsibilities contracted or incurred before marriage, and for such contracted after marriage, except as in this act provided." Under this section of the statute, appellant would not have any interest in or control of the personal property of appellee, whether she owned it at the time of her marriage or after the marriage. The fact that he got possession of the eight hundred dollar note without valuable consideration would not have divested the appellee of her right to it. The mere reduction of it to his possession would not have given him any property rights in or to the note. Had she died while her husband had the note in possession, it would not for that reason have belonged to him. Had he refused to surrender it to her in her lifetime, she could, by appropriate action, have compelled him to do so. If the husband had not acquired the right to the note by contract, although the judgment for divorce had not provided for the restoration of their respective property, still she could have maintained the action to recover the note or its value, if he had converted it to his own use. The mere fact that he disposed of the note before the judgment of divorce does not prevent appellee from recovering the note or its equivalent. The provision of section 425 of the code to the effect that property is not to be restored which had been previously disposed of is not operative against the rights of the wife created and fixed by section 2127 of the Kentucky Statutes of 1903. So her right to maintain this action is independent of the judgment¹⁹ granting the appellant a divorce. It exists in virtue of section 2127 of the

Kentucky Statutes of 1903. Although the court might have adjudged, under section 425 of the Code of Practice, that the appellant would not have been compelled to account to the appellee for the amount of the note, had he converted it to his own use previous to the commencement of the action for divorce, still, under section 2127 of the Kentucky Statutes of 1903, which must be read in connection with the code section supra, this action can be maintained. In the case of *Price v. Price*, 25 Ky. Law Rep. 1803, 78 S. W. 888, this court held that a husband can become indebted to the wife under the act of 1894, and execute to her an enforceable obligation. This declaration was made in an action wherein the wife sought to recover from the husband the amount of the note which he had executed to her previous to the commencement of the action for divorce. The court based her right to recover upon the statute. The court did not allow her to recover simply because it was a note creating an obligation, but the recovery could have been had on any legal liability which the husband had incurred to the wife previous to the commencement of the action for divorce.

Judgment affirmed.

A Privileged Communication Between Husband and Wife are not rendered admissible in evidence by their subsequent divorce: *Robinson v. Robinson*, 22 R. L. 121, 84 Am. St. Rep. 832; *State v. Kodat*, 158 Mo. 125, 81 Am. St. Rep. 292; note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 418.

Contracts to Facilitate Divorce are unenforceable, as against public policy: *Barngrover v. Pettigrew*, 128 Iowa, 533, 111 Am. St. Rep. 206.

BENNETT v. LOUISVILLE RAILWAY COMPANY.

[122 Ky. 59, 90 S. W. 1052.]

CARRIER—Starting Car Before Passenger is Seated.—A street railway company is not required to hold its car still until every passenger that boards it takes a seat, unless he is old, feeble or otherwise in a condition demanding unusual care. (p. 455.)

R. C. & J. J. Davis, for the appellant.

Fairleigh, Straus & Fairleigh, Kohn, Baird & Spindle, and Greene & Van Winkle, for the appellee.

¶ NUNN, J. Appellant instituted this action against the appellee to recover damages for injuries received upon one of its cars, as she alleged, by the negligent management and op-

eration thereof by the motorman. On the trial the jury returned a verdict in favor of the appellee, and she has appealed.

She alleged in her petition, in substance, that the ⁶² motorman stopped the car for her, and as she entered the door of the car and was in the act of taking her seat, the motorman negligently turned on the current and started the car with a sudden and unusual jerk, by which she was thrown with great force and violence against the end or edge of the seat, and by reason of which she received painful injuries to her body and spinal column; that she was made sick and sore, and confined to her bed for a long time, suffering great pain, and was compelled to undergo a serious and painful operation, in the removal of the lower end of her spinal column; that her loss of time and medical expense amounted to five hundred dollars, and was otherwise injured and damaged to the extent of five thousand dollars. The appellant asked for a reversal, for the reason that the verdict was against and contrary to the evidence. That the court erred in giving to the jury instructions 2 and 3.

The appellant and one witness sustained her allegation that the jerk in starting the car by the motorman was a sudden and unusual one, and that by reason thereof she was injured, and in the way and manner and to the extent stated. There was no contrariety of evidence as to the extent of her injuries. The appellee introduced one witness, whose testimony tended to show that the jerk made in starting the car was not sudden or unusual. We are of the opinion that the preponderance of the evidence favored the claim of the appellant, but we are not authorized to reverse the judgment of the lower court on that account.

Instruction No. 3 complained of by appellant is an instruction in the usual form upon the question of contributory neglect. The objection to this instruction ⁶³ is that there was no evidence upon which to base it. It is true that there was a bare scintilla of evidence, if any, to authorize it. It is a doubtful question as to whether or not it should have been given, but in our opinion the giving of it did not prejudice the substantial rights of the appellant.

Instruction No. 2 reads as follows: "It was not the duty of the agent and servant of the defendant in charge of the car to have the car remain standing until the plaintiff was seated in said car; and unless you believe from the evidence

that the said agent or servant in charge of the car failed to exercise that degree of care with which he was charged, as set out in instruction No. 1, and by a reckless or unnecessary jerk or lurch of said car started the same, and the plaintiff was injured thereby, the law is for the defendant, and you should so find." By the first instruction the court, in effect, instructed the jury that it was the duty of the agent of appellee in operating the car upon which appellant was a passenger to observe the highest degree of care which a prudent person would exercise under like circumstances, in the management and control of the car, to enable appellant to board it with safety, and if the jury believed from the evidence that the agent in charge failed to exercise the degree of care stated, and by a reckless or unnecessary jerk or lurch of the car started the same, and appellant was thereby thrown against the seat and injured, then the law was for her.

The appellant complains of that part of the second instruction which told the jury that it was not necessary for the agent in charge of the car to have it remain standing until the appellant was seated. This ⁶⁴ instruction seems to be in conformity with the rule enunciated in the case of Louisville etc. R. R. Co. v. Hale, 102 Ky. 600, 19 Ky. Law Rep. 1651, 44 S. W. 213, 42 L. R. A. 293, and Sheffer v. Louisville etc. R. R. Co., 22 Ky. Law Rep. 1305, 60 S. W. 403. Both of these cases, however, were against steam railways, but we can see no reason why the same rule would not be applicable to street railways. It would be impracticable to require in every instance those in charge of a street-car to have it remain still until every passenger that boards it takes a seat. This would make street-car travel slow, vexatious and inconvenient.

There are instances in which a car should be permitted to remain still until the passenger is seated; that is, where the passenger is old, feeble, crippled, or in any condition which makes it reasonably apparent to those in charge of the car that the person needs unusual care and precaution for his or her protection. But the case at bar does not come within this rule. It is true that she was proven to be large and fleshy, but there was no proof that her flesh was any great burden to her, nor was there anything proven which might have indicated to the motorman in charge of the car that any extra precautions were required on his part for her safety.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

A Street Railway is negligent if it starts a car before a passenger has gained a secure foothold on the platform, but it is not required to wait until he has taken his seat, or even has entered the doorway, before starting, unless the passenger is infirm or for other reasons is entitled to special care: *Sharp v. New Orleans City R. R. Co.*, 111 La. 395, 100 Am. St. Rep. 488; *Clark v. Durham Traction Co.*, 138 N. C. 77, 107 Am. St. Rep. 526.

GARNETT v. FOSTON.

[122 Ky. 195, 91 S. W. 668.]

WILL—Appeal from Probate.—A Bond is not Necessary on an appeal from the county to the circuit court in proceedings for the probate of a will. (pp. 458, 459.)

WILL—Subscription by Mark.—A will may be duly executed by the testator making his mark between the words of his name which were subscribed to the will by the draftsman out of the testator's presence. (pp. 460, 462.)

Wilfred Carrico and Little & Slack, for the appellants.

C. W. Wells, for the appellees.

¹⁹⁷ O'REAR, J. A paper purporting to be the last will and testament of John Garnett, deceased, was tried for probate in the Daviess circuit court, where, upon a trial before a jury, the paper was found to be the will of John Garnett and ordered to probate.

This appeal involves two questions of law. The first is, Is it necessary, in prosecuting an appeal from a county court to a circuit court, probating or rejecting a will, that the appellant should execute an appeal bond in the circuit court as an antecedent step in taking the appeal? Title 16 of the Civil Code of Practice is devoted to practice in quarterly courts, and police, county, and justice's courts. Section 724 reads: "Appeals may be taken in the following manner: The party appealing shall produce to the clerk of the court, to which the appeal is taken, a certified copy of the judgment, and amount of costs, and cause to be ¹⁹⁸ executed before him by one or more sureties to be approved by him, a bond to the effect that the appellant shall satisfy and perform the judgment that shall be rendered upon the appeal," etc. It is contended for appellant that this provision applies to all appeals from county courts, and that, as no appeal bond was executed in this case,

the appeal should have been dismissed on her motion by the circuit court. Section 700 of the Civil Code of Practice provides that "the provisions of this code shall regulate the proceedings in civil actions in quarterly courts, county courts, police courts, city courts, mayor's courts and courts of justices of the peace, except as is provided in this chapter": Chapter 16.

It is hard to reconcile the language of section 724 with any other practice, as there is none other relative to this subject found in the code. There are, however, many instances of practice in the county courts, allowed by statute, that the provisions of the code cannot and do not apply to. For example, an application to open a road, to grant a tavern license, to remove or appoint an administrator or guardian, to surcharge the settlement of such, a bastardy proceeding, forcible entry and detainer, to list omitted property from taxation, to review assessments illegally made, and the like. To all of these proceedings many of the provisions of the code do apply. But in every instance a special practice, in some particular, is provided by statute other than the code, peculiar to the particular subject, and which is not treated of at all in the code. Where the legislature has been to so much pains, and in so many instances, to provide by statute regulating a given subject for a practice particularly suited to it, it cannot be supposed that it ¹⁹⁰intended, when the code was adopted, to repeal all such provisions, or, on the other hand, when a later statute was adopted, to repeal the code provisions as to that matter. On the contrary, we must assume from the nature of the matter that it was intended to apply the code to all practice to which it was applicable, in whatever court; but where special jurisdiction was conferred upon an inferior court, and a particular practice required by the statute as to it, it was not intended to apply also code provisions that had no logical place in such proceeding. Trials in inferior courts, where appeals can be prosecuted from them, are inclusive if an appeal is taken. They are tried in the appellate tribunal, generally, as if no previous trial had taken place. But the prosecution of the appeal results in a suspension of the judgment appealed from, as by supersedeas. This is not so of appeals in will cases. Though on the appeal to the circuit court a trial is had as if no trial had occurred in the county court, the appeal does not suspend the judgment of the county court: *King's Admr. v. Rose*, 100 Ky. 393, 18 Ky. Law Rep. 862, 38 S. W. 844.

It will need little argument to show that, where a judgment is suspended by appellant, he should engage, as a condition, to perform such judgment as might be rendered on the appeal.

We will allude to some of the characteristics of an appeal from the county court to the circuit court in a will case, showing the difference between such proceeding and an appeal from a judgment for money, in the county court, under the code. The Civil Code requires appeals from these inferior courts to be prosecuted within sixty days from rendition. Section 4850 of the Kentucky Statutes of 1903 allows an appeal in a will case ²⁰⁰ to be prosecuted to the circuit court within five years. The code gives the concluding argument to the party having the burden of the proof. The statute in the will case gives the concluding argument to the propounder of the will, without regard to who has the burden of proof in the case. In a will contest provision is made for taking depositions (section 4855) that are inapplicable in other cases under the code. No person can appeal from a judgment under the code who was not a party to the action or proceeding. Any party in interest, whether or not a party in the county court, can prosecute an appeal from a judgment of the county court probating or rejecting a will. By section 724 of the Civil Code of Practice, upon the filing with the clerk of the circuit court of the copy of the judgment of the inferior court and the execution of the bond required by that section, "whereupon the clerk shall issue an order to the judge, mayor, or justice, rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the case." Section 4851 of the Kentucky Statutes of 1903, regulating stay of proceedings upon appeal in a will case, reads: "An appeal to the circuit court from an order of a county court, admitting a will to record, or the rejection of it, shall not prevent the appointment of an administrator or executor by the proper court, and the settlement, distribution and division of the decedent's estate, unless proceedings are commenced in the proper circuit court within twelve months from the entering of the order admitting the will to record or rejecting it by the county court: Provided, the circuit court in which proceedings may be thereafter pending on appeal may make an order restraining the further distribution and division of the estate."

²⁰¹ Enough has been said to show that the legislature, in providing appeals from county to circuit courts in will cases,

has laid down a materially different procedure from that provided in other cases generally, and for obviously different reasons. We conclude that it was intended that the statutory provisions regulating such appeals (in will cases) were intended to be in lieu of the code provision regulating appeals generally from county to circuit courts, and that therefore, as bond is not required by the statute (unless the circuit court should order one to be executed where a stay in the county court was asked under section 4851 of the Kentucky Statutes of 1903), it is not necessary to execute such bond in order to prosecute the appeal. Before the adoption of the present code in 1877, the old code (Myers' Code, c. 10, sec. 519) regulated the practice in will cases. The present code does not treat of the subject specifically. Under the Revised Statutes in force contemporaneously with Myers' Code, there were additional provisions regulating the practice in will cases. The time of prosecuting an appeal to the circuit court was fixed differently in the general provision on appeals in the code, and in the statute concerning wills. This court, in *Arterburn's Exrs. v. Young*, 14 Bush, 509, held that the chapter in Myers' Code on wills, and the chapter in the Revised Statutes on wills, contained a complete law on the subject. The general provision of the code, inconsistent with the statute on wills, was held not to apply to the practice in will cases. Such seems, also, to have been the view adopted in *Jones v. Jones*, 3 Met. (Ky.) 266.

The remaining question is as to the sufficiency of the signature of the testator. The will was written ²⁰² wholly by another, not in testator's presence, including testator's name, which was subscribed to the will thus: "John Garnett." The will was read over to testator (who had previously directed the draftsman as to its provisions), and, upon his signifying his satisfaction with its form, was presented for his signature. He could not write—a fact known to the draftsman. His signature was then executed by his making his mark, a cross, between the words "John" and "Garnett," and the draftsman writing above the cross the word "his" and below it the word "mark," all done in the testator's presence, and in the presence of subscribing witnesses, so that the signature then read:

his
"JOHN X GARNETT."
mark.

The statute on this subject reads as follows: "No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction; and, moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

It is contended that the testator's name, "John Garnett," must have been written in his presence before the will can be valid as a testamentary document. The statute of 1797 (1 Litt. Laws, p. 611, c. 293, sec. 1) provided that a devise of land should be valid only if "such last will and testament be signed by such testator or testatrix, or by some other person in his or her presence, and by his or her ²⁰⁸ direction; and moreover, if not wholly written by himself or herself, be attested by two or more competent witnesses, subscribing their names in his or her presence." Under this last-named statute it was held in the case of Cochran's Will, 3 Bibb. 491, that the testator's name, signed by another person, when subsequently acknowledged by the testator to be his will, and thereupon attested by the subscribing witnesses in his presence, was a substantial compliance with the law. In Shanks v. Christopher, 3 A. K. Marsh. 144, the name of the testator was signed to the instrument, with the mark of a cross between the Christian and surname. The testator could neither write nor read writing. He acknowledged the execution of the paper in the presence of the subscribing witnesses, who thereupon affixed their signatures in his presence. The court thought that, as the statute did not require the testator to sign in the presence of the subscribing witnesses, other evidence than that of the subscribing witnesses having seen the instrument signed by the testator was admissible, "and," the court observed, "we imagine none more competent nor more satisfactory than the acknowledgment by the testator of the will with his signature annexed." In Pate's Admr. v. Joe, 3 J. J. Marsh. 113, Thomas Pate's will was admitted to probate. His name was signed, not by himself. The subscribing witness, who had signed the testator's name and his own, was dead. The other subscribing witness did not see the testator sign, nor hear him authorize the signing of the document. Yet he proved his own attesting signature, and gave such further evidence that

the court found from it an acknowledgment by Pate of his signature. It was held sufficient publication of the will.

²⁰⁴ By section 5, chapter 106 of the Revised Statutes, the law was changed into its present form: Ky. Stats. 1903, sec. 4828. Upchurch's will, made in 1853 (16 B. Mon. 102), was written by another, and the testator's name also signed by the draftsman. Whether in testator's presence does not appear. Afterward testator acknowledged it in the presence of witnesses, who then attested it in his presence. The court said: "The section referred to is a substantial re-enactment of the act of 1797. Its requisitions being similar in import and substance, if not so in phraseology, there is not much difficulty in determining that the acknowledgment of a will by the testator, in the presence of the witnesses, though written and his name subscribed by another at another time, was a sufficient publication." It is not essential to the validity of a will, and never was in this state, that the testator should personally have signed it. It is enough if he authorizes another to sign his name and that it is done in his presence. In *Sechrest v. Edwards*, 4 Met. 163, decided after the adoption of the Revised Statutes and concerning a will made after the Revised Statutes became effective, it appears that Sechrest, the testator, could not write. His will was written by another, and his name signed thereto. By whom or when is not shown. But the testator made his mark after one of the attesting witnesses signed, but in the presence of the two. The court, in the course of the opinion, gives these facts and this conclusion: "So that Sechrest's name must have been subscribed to the paper before he saw it; and, after his name had been subscribed to the paper, he acknowledged it to be his will, which was a compliance with the requisition of the statute, and the placing ²⁰⁵ the mark to it, whether by Sechrest or Carter, was wholly unnecessary." It was also declared in that case that the provisions of the Revised Statutes and of the statute of 1797, quoted above in this opinion, were the same in import and substance.

We get very little aid in this case from decisions defining a signing of a paper. A mere signature may be by a mark or other symbol by which the act of affixing the name is solemnized. Here the requirement is that the testator's name must be subscribed by himself or another in his presence and by his direction. A literal compliance would seem to require that, unless the name—not the signature necessarily—is

affixed in the presence of the testator, the paper would be invalid. But the course has never been to demand literal compliance with such provision. On the contrary, the rule in this state has always been that a substantial compliance will satisfy the statute; *Soward v. Soward*, 1 Duvall, 126; *Porter v. Ford*, 82 Ky. 191, 6 Ky. Law Rep. 60; *Mile's Will*, 4 Dana, 1; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Flood v. Pragoff*, 79 Ky. 607, 3 Ky. Law Rep. 372. The act in this case was a full acknowledgment of the document and adoption of the subscription of his name by the testator in the most solemn form possible. By adding his mark he affixed his own signature to it, a work of supererogation, it may be, but efficacious at least to adopt as his the act of another in attaching his name to the document. The signature of the name as it finally appeared became, in part at least, his own act. It would have been an idle thing to have had his name erased and again signed, by the same person, perhaps, or at least for the same purpose. His acknowledgment of it in the presence of the requisite witnesses ²⁰⁶ serves every purpose of the statute. Upon authority and principle, we conclude that the statute has been substantially complied with, and that the publication of the will was sufficiently established.

The rulings of the circuit court having been in accord herewith, the judgment sustaining the will is affirmed.

The Mark of a Testator to His Will is just as effective as when he signs his name: *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265; *Rook v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163; *Scott v. Hawk*, 107 Iowa, 723, 70 Am. St. Rep. 228.

**FLEGE v. COVINGTON AND CINCINNATI ELEVATED
RAILWAY, TRANSFER AND BRIDGE COMPANY.**

[122 Ky. 348, 91 S. W. 738.]

COVENANT TO MAINTAIN WALL—When Runs with Land.
A covenant in a deed of a right of way for a railroad that as part consideration for the conveyance the grantee shall erect a retaining wall between the grantor's land and the right of way, keep it in repair at all times, and renew it when necessary, runs with the land. (p. 464.)

COVENANT TO MAINTAIN WALL—Limitation of Action for Breach.—A covenant to keep a retaining wall in repair at all times, and to renew it when necessary, is a continuing contract not affected by the statute of limitations until after the covenantor refuses to repair or renew as the case may be. The fact that in the first instance he constructed the wall of wood, instead of stone as covenanted for, does not set the statute in motion. (pp. 464, 465.)

COVENANT TO MAINTAIN WALL—Estoppel Against Covenantee.—The fact that a grantor of a right of way acquiesces in the grantee building a retaining wall of wood, instead of stone as covenanted for in the deed, does not estop him from demanding a stone wall when the grantee removes the wooden one. (p. 465.)

COVENANT TO MAINTAIN WALL—Specific Performance.—A covenant in a deed of a railroad right of way that the grantee shall erect a retaining wall between the grantor's land and the right of way, keep it in repair at all times, and renew it when necessary, may be specifically enforced. (pp. 465, 466.)

John W. Henner, for the appellant.

Galvin & Galvin, for the appellee.

³⁵⁰ **BARKER, J.** In 1888, the appellant, George Henry Flege, by deed conveyed to the Contracting and Building Company, the subsequent vendor of appellee, its successors and assigns, a part of a lot of ground belonging to him, situated in Covington, Kentucky, for the purpose of building and maintaining thereon a line of railway. In addition to the money consideration provided for in the deed, that instrument contains the following covenant: "It being, however, understood and agreed, and said agreement being in part the consideration of this conveyance, that the said Contracting and Building Company is to at once erect a stone wall along the line of said Flege's lot, adjoining ³⁵¹ the portion hereby conveyed from the level of said Flege's lot down as far as the said company may grade or dig, and to erect at once along said line upon said stone wall a modern fence of ordinary height, and to at all times keep said wall and fence in good

and sufficient repair and to renew the same when necessary." This covenant runs with the land, and the subsequent vendees of the Contracting and Building Company are liable to Flege in the same manner and to the same extent as their vendor. After the deed was executed and delivered, the original vendee took possession, and either itself or its successor, the appellee, graded it off and constructed thereon a line of railway which the appellee now owns, operates and controls. After the land conveyed by Flege was graded, a stone wall was not erected along the line of this lot, for the purpose of shoring it up, as was covenanted to be done, but instead, there was erected a wooden wall, or fence for that purpose, which he seems to have either accepted or submitted to as a sufficient compliance with the covenant for a retaining wall. And thus matters stood from 1888 to 1903, when appellee removed the wooden fence from along the line of appellant's lot, over his protest and objection; whereupon he then demanded that it should erect a stone wall in lieu of the wooden one originally built, and wrongfully, as it alleged, removed. With this demand the appellee refused to comply; whereupon appellant instituted this action, setting out the foregoing facts, and praying for a judgment requiring the appellee to specifically perform its covenant of renewing and maintaining the retaining wall along the line of his property. Appellant afterward filed two amendments to his original petition, which, from ³⁵² the view we take of his rights under the covenant in the deed, add little or nothing to the original petition. A general demurrer was sustained to the petition as amended, and, appellant declining to plead further, his petition was dismissed, of which he is now complaining.

It is said that the learned trial judge was of opinion that plaintiff's cause of action was barred by the statute of limitation, as shown on the face of the petition, and for this reason the demurrer was sustained and the petition dismissed. However this may be, appellee contends on this appeal that, when the retaining wall was originally built of wood, instead of stone as covenanted for, this was a breach of the covenant for which the appellant was bound to institute an action to recover all the damages that could accrue to him under the contract, and that in default of such action, the statute of limitations commenced at once to run, and he was barred of all right to maintain any action on the covenant after the expiration of fifteen years. It seems to us this view of the matter

cannot be maintained. The covenant to keep in repair and renew when necessary is a continuing contract, not affected by the statute of limitations until after the covenantor refuses to repair or renew, as the case may be. Appellant had a right to submit to the substitution of a wooden wall for the stone; and while the former was, perhaps, neither as ornamental or durable as the latter, still, it served the purpose of retaining his lot in place, and prevented it from caving in and falling down. This acquiescence was much to the advantage of appellee, it being enabled by this indulgent complaisance to escape the larger outlay involved in the building of ³⁵³ a stone wall by building one of wood; and having thus by acquiescence, if not permission, been allowed to substitute a wooden retaining wall, it was under the continuing duty of keeping it in repair and renewing it when necessary.

Nor does it follow because, originally, appellee was permitted to erect a wooden retaining wall, that, when the necessity should arise to renew it under the covenant, it could do so by rebuilding a wooden wall. If it had originally built a stone wall of such quality as would need renewal now, certainly it would be required, under the covenant, to build a new stone wall, and we are able to perceive no reason, either in law or logic, whereby it can escape the obligation of its covenant to renew now with a stone wall. It received the benefit of being allowed to build the original retaining wall of wood. By this it saved money. Because appellant was indulgent to it then does not deprive him of the benefit of his covenant now. He is entitled to all of the covenant except that which he has waived, to wit, the substitution of a wooden fence for the original stone wall. Undoubtedly, during the existence of the original wooden wall, appellant, having permitted it to be built, could not arbitrarily require the corporation to pull it down and erect a new stone wall, because this would be allowing him to mislead it to its hurt; but if, by its own wrongful act, it has pulled down and removed the wooden wall, or this has from old age become decayed and useless, so as to make a new wall necessary in order to comply with the original covenant, then appellant is entitled to that which is "nominated in the bond."

Appellant had a right to accept the wooden wall as ³⁵⁴ a sufficient compliance with the original covenant, and, having done so, no cause of action accrued to him until there was a breach of the covenant, either to maintain or renew. The cov-

enant to renew was not broken, so far as this record shows, until the appellee removed the wooden wall and refused to rebuild. The cause of action being on the covenant to renew, which only arose in 1903, it follows that the trial court erred in sustaining a demurrer to the petition on the ground that the cause of action was barred on the face of the pleadings. In the American and English Encyclopedia of Law (volume 19, page 201), under title "Limitations of Actions," it is said: "If the contract for a breach of which the action is brought is from its nature a continuing one—e. g., a contract to furnish support for the life of the plaintiff—a new cause of action arises with each failure of the defendant, and the plaintiff's right to enforce the contract is never barred": See, also, *Coleman v. Whitney*, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517, and *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369.

We think there is no doubt of appellant's right to have his contract specifically enforced. In Pomeroy's Equity Jurisprudence, section 1404, the rule is thus stated: "Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text-writers": See, also, *Louisville etc. R. R. Co. v. Zaring*, 9 Ky. Law Rep. 107; *Schmidt v. Louisville etc. R. R. Co.*, 101 Ky. 441, 19 Ky. Law Rep. 666, 41 355 S. W. 1015, 38 L. R. A. 809; Story's Equity Jurisprudence, sec. 728. The appellant's contract is in writing. It is certain in its terms, and upon sufficient consideration. There is no difficulty or hardship in complying with it, as is shown by the fact that it was complied with for more than fifteen years. It would be impossible, we think, to estimate in money the damages for nonperformance, and therefore the covenant to renew and repair comes up to the full measure of those contracts for personal service which the chancellor will specifically enforce.

For these reasons the judgment is reversed, for proceedings consistent herewith.

On Covenants Which Run with the Land, see the note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 664.

The Right to Specific Performance of a contract is generally said to rest in the sound discretion of the court: *Boldt v. Early*, 83 Ind. App.

434, 104 Am. St. Rep. 255; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 97 Am. St. Rep. 1027, and cases cited in the cross-reference note thereto. Yet in a proper case it is as much a matter of course for a court of equity to decree the specific performance of a contract as for a court of law to award damages for its breach: *Marshall v. Keoch*, 227 Ill. 35, 118 Am. St. Rep. 247.

BROMLEY v. WASHINGTON LIFE INSURANCE COMPANY.

[122 Ky. 402, 92 S. W. 17.]

LIFE INSURANCE—Lack of Insurable Interest.—Where, in accordance with a previous arrangement between the parties, one takes out a policy of insurance on his life payable to his estate, and assigns it to the other, who has no insurable interest, but who pays the insured a consideration therefor and also pays all premiums, the policy is unenforceable as a wagering contract. (p. 469.)

LIFE INSURANCE—Incontestable Clause.—A policy of life insurance which is opposed to public policy is not rendered enforceable by an incontestable clause. (p. 470.)

WITNESS—Transactions with Decedent.—The assignee of a life insurance policy, who is made a defendant by the administrator suing on the policy, is competent to testify, in behalf of the insurance company, as to transactions with the decedent. (p. 470.)

J. J. Orr, T. S. Orr, V. H. Abbott and W. S. Pryor, for the appellant.

Thomas W. Bullitt and John S. Guant, for the appellee.

403 **HOBSON, C. J.** In December, 1900, George Bromley made an arrangement with Otis Bates by which he was to have his life insured for one thousand dollars, and Bates was to pay the premiums and pay him fifty dollars for the policy, which was to be assigned to Bates by Bromley. He made the application for the policy in Washington Life Insurance Company, which issued the policy on January 29, 1901, the policy being payable to his estate. Bromley and Bates then came to the office of the local agent. Bates was fixing to pay the premium and Bromley asked him if he would not take another one thousand dollars on the same terms. He agreed to pay the premiums and pay him twenty-five dollars for another policy of like amount. Bromley then applied for another policy and the application was sent on, the agent retaining the policy which had come and Bates giving the agent

a check for one hundred and twenty-seven dollars and sixty-four cents, the premium on the two policies. On February 18, 1901, Bates gave Bromley a check for seventy-five dollars for the two policies as promised. The policies were assigned by Bromley to Bates. The assignment on the policies is dated March 25, 1901. The policies were never delivered to Bromley, but remained in the hands of the insurance agent until ⁴⁰⁴ the assignment was put on them and he then delivered them to Bates. When the subsequent premiums fell due on the policies they were paid by Bates; after this Bromley died and this suit was brought by his administrator to recover on the policies. Bates was made a defendant and by his answer set up that the policies belonged to him. The insurance company pleaded the facts above stated, insisting that the policies were a wagering contract and void. On final hearing, the court dismissed the petition of the administrator and he appeals.

The proof shows clearly that Bates had no insurable interest in the life of Bromley, and while the assignment on the policies is dated March 25, 1901, the proof is clear that the policies were taken out by Bromley for the purpose of assigning them to Bates, under the arrangement that Bates was to pay him seventy-five dollars for them and pay the premiums. In other words, the arrangement was simply that Bromley was to get seventy-five dollars for having his life insured for Bates' benefit, Bates to pay the premiums on the policies. It is conceded that if the policies under this arrangement had been made payable to Bates they would have been void, as he had no insurable interest in the life of Bromley. But it is insisted that as they were made payable to Bromley's estate and were assigned by him to Bates, only the assignment is void, and that his administrator may recover of the insurance company. There would be force in this, if the policies had been delivered to Bromley and the assignment to Bates had been a subsequent and independent transaction. But the proof leaves no doubt that Bromley did not contemplate insuring his life for the benefit of his estate at any time. He contemplated ⁴⁰⁵ simply getting seventy-five dollars out of the arrangement. The policies were never intended to be delivered to Bromley. Bates was to pay the premiums and get the policies. The policies did not become effective until the first premium was paid. Bates paid the premium upon the idea that the policies were to be assigned to him, and for this reason they were left in

the hands of the insurance agent until the assignment was made, the delay in closing up the matter being due to the fact that the parties had to wait for the second policy to come. To hold such an arrangement good would be to shut our eyes to the truth and to enforce a mere form. The law does not allow one who has no insurable interest in the life of another to insure it for his benefit, for the reason that it is a mere wager and holds out a temptation to fraud, the insurer having no interest in the life of the assured and having a direct interest in his death: *Basye v. Adams*, 81 Ky. 368, 5 Ky. Law Rep. 91; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Keystone M. B. Assn. v. Norris*, 115 Pa. 446, 2 Am. St. Rep. 572, 8 Atl. 638; *Steinback v. Diepenbrock*, 158 N. Y. 24, 70 Am. St. Rep. 424, 52 N. E. 662, 44 L. R. A. 417. In the latter case the court said: "The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself, and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned under such circumstances would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the court would unhesitatingly declare in accordance with the facts, reading the ⁴⁰⁶ policy and the assignment together, as forming part of one transaction." The cases of *Prudential Life Ins. Co. v. Cummins' Admr.*, 19 Ky. Law Rep. 1770, 44 S. W. 431, *New York Life Ins. Co. v. Brown's Admr.*, 23 Ky. Law Rep. 2070, 66 S. W. 613, and *Griffin's Admr. v. Equitable Assur. Soc.*, 119 Ky. 856, 27 Ky. Law Rep. 313, 84 S. W. 1164, may be distinguished from this case. In the first case, there was no assignment of the policy to the person who paid the premiums, and the court simply held that the fact that a stranger paid the premiums did not invalidate the policy. In the second case, the assignee testified that he had no interest in the policy until it was assigned to him subsequent to the delivery. In the last case the insurance company had paid the money to the persons to whom the policies were payable and after this was sued by the administrator of the assured. The court in deciding that the insurance company was not liable used this language: "The transaction as to each policy was clearly a speculation upon the hazard of human life, and consequently a gambling scheme, pure and simple, which rendered the policies void, because against public policy; and, if void, no cause of action against appellee

exists in favor of Griffin's administrator for the recovery of the proceeds."

It is also insisted for the plaintiff that as the policies contain a clause to the effect that they are incontestible after one year, the company cannot rely upon this defense. But the incontestable clause is no less a part of the contract than any other provision of it. If the contract is against public policy, the court will not lend its aid to its enforcement. The defense need not be pleaded. If at any time it ⁴⁰⁷ appears in the process of the action that the contract sued upon is one which the law forbids, the court will refuse relief. The parties to an illegal contract cannot by stipulating that it shall be incontestable, tie the hands of the court and compel it to enforce contracts which are illegal and void. If this were allowed, then the law might be evaded in all cases and the aid of the court might be secured in aid of its infraction. In *Hall v. Coppel*, 7 Wall. 542, 19 L. ed. 244, the United States supreme court said: "The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, 'Ex dolo malo non oritur actio,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

Lastly, it is insisted that Bates is not a competent witness. He cannot testify for himself as to any transaction had with the decedent, but he may testify for the insurance company. The administrator by making Bates a defendant to the action cannot deprive the insurance company of the benefit of his ⁴⁰⁸ testimony. As between the insurance company and the administrator, Bates does not testify for himself: *Dovey v. Lam*, 117 Ky. 19, 25 Ky. Law Rep. 1157, 77 S. W. 383.

Judgment affirmed.

A Life Insurance Policy procured under an agreement between the insured and a person having no insurable interest in his life, that such person shall pay the premiums and receive the proceeds of the policy, is held void as a wagering contract in *Hinton v. Mutual Reserve etc. Assn.*, 135 N. C. 314, 102 Am. St. Rep. 545; *Metropolitan Life Ins. Co. v. Elison*, 72 Kan. 199, 115 Am. St. Rep. 189. Compare, however, *Harrison v. Northwestern etc. Ins. Co.*, 78 Vt. 473, 112 Am. St. Rep. 932. The assignment of life insurance policies is the subject of a note to *Chamberlain v. Butler*, 87 Am. St. Rep. 484. For authorities holding that such assignments may be made to persons having no insurable interest in the life of the insured, see *Harrison v. Northwestern etc. Ins. Co.*, 78 Vt. 473, 112 Am. St. Rep. 932; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650.

Incontestable Clauses in Life Insurance Policies are valid and given a liberal interpretation in favor of the insured: *Royal Circle v. Achterrath*, 204 Ill. 549, 98 Am. St. Rep. 224. As to the effect of such clauses, see the recent cases of *Reagan v. Union Mut. Life Ins. Co.*, 189 Mass. 555, 109 Am. St. Rep. 659; *Pacific Mut. Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 112 Am. St. Rep. 862, and cases cited in the cross-reference note thereto.

MUTUAL LIFE INSURANCE COMPANY v. TWYMAN.

[122 Ky. 513, 92 S. W. 335.]

LIFE INSURANCE—Pledge or Assignment of Policy.—A statute providing that where the beneficiaries in a policy of life insurance are the wife and children of the insured, the insurance shall be paid to them free from his debts, does not prevent him from assigning the policy, or pledging it with the company as security for a loan, without their consent. (p. 476.)

LIFE INSURANCE—Assignment as Collateral—Enforcement of Pledge.—Where an insured assigns his paid-up policy to the company as security for a loan, it cannot, on his default in paying the debt, forfeit, cancel or sell the policy, but it must resort to equity to enforce its rights, basing them on the surrender value of the policy. If the court finds that the surrender value exceeds the debt, the insured is entitled to receive such excess in money, or in paid-up insurance, as he elects. (p. 479.)

Falconer & Falconer, Long & Price and Kohn, Baird & Spindle, for the appellant.

C. J. Bronston, for the appellees.

515 SETTLE, J. In view of the importance of the questions involved in this case and the uncertainty of the court as to the correctness of some of the conclusions expressed in its opinion of October 12, 1905 (see *Mutual Life Ins. Co. v. Twyman etc.*, 28 Ky. Law Rep. 167, 89 S. W. 178), a rehearing

was granted upon the court's own motion, the opinion withdrawn and an oral argument allowed. Since the resubmission of ⁵¹⁶ the case it has been duly considered by the full bench, with the result set forth in this opinion.

The following brief statement of the facts will be necessary to give an understanding of the questions presented for decision. On March 14, 1884, the appellant insurance company issued and delivered to the appellee, James C. Twyman, a policy of \$2,000 upon his life, payable at his death to his wife and two sons, all of whom are still living. The policy was what is called "A fifteen payment life"—that is, after the payment of fifteen annual premiums it became a paid-up policy. The insured paid on this policy fifteen annual premiums of \$90.66, each, the aggregate of which amounted to \$1,359.90. Five months after the payment of the fifteenth and last premium, appellee, James C. Twyman, borrowed of appellant \$700, and for this amount executed his promissory note, of date, July 8, 1898, bearing seven per cent interest from date, and payable one year after date. To secure the payment of the note he, without the consent of the beneficiaries, assigned and delivered to appellant the policy. No indorsement was made on the policy, but on the face of the note this statement appears: "As collateral security for the payment of this note, I hereby assign, transfer, and deliver to the said company, policy No. 8800 for \$2,000, which is to be returned to me upon the payment of this note and interest at maturity. The said policy is hereby assigned and surrendered to said company for cancellation in satisfaction of this note, and in settlement of the cash surrender value of said policy." Appellee, James C. Twyman, made the following payments of interest on the note: \$24.50, January 11, 1899; \$24.50, July 8, 1899; \$24.50, January 11, 1900; \$24.50, January 1, 1901; but failed to make any further payment ⁵¹⁷ of interest, or to pay the principal of the note, whereupon appellant, on May 12, 1902, undertook, without the consent of the insured or the beneficiaries, to cancel the policy on the life of the former, by calculating its cash surrender value as of that date, in doing which it professed to compute interest at six per cent on the amount of the loan from the date of the note to May 12, 1902, and applied the sums paid on the note as interest, as of the dates of their payment respectively, which left, as claimed by appellant, after satisfying the note, a balance of the cash surrender value of the policy amounting to \$5.47, and this sum appel-

lant tendered appellee, James C. Twyman, in money, which he refused to accept. Having failed to obtain the latter's acceptance of the sum thus tendered him, appellant instituted this action in equity against him, his wife and children, to have the policy canceled and compel appellees to accept the \$5.47, alleged to be due them in settlement of its cash surrender value, less the amount appropriated in satisfaction of the note. Appellees filed a demurrer to the petition, which the lower court sustained, and appellant refusing to plead further, judgment was entered dismissing its action, and from that judgment it has appealed.

The demurrer was based upon two grounds: 1. That such a pledge and assignment of the policy as was attempted by appellee was forbidden by appellant's charter; 2. That in any event it could not, without the consent of the beneficiaries, legally be assigned or pledged for a loan to the insured, or forfeited or canceled by appellant because of the failure of the insured to repay such loan. The charter of appellant (amendment enacted in March, 1878) provides: "Any policy of insurance heretofore ⁵¹⁸ issued, or that may hereafter be issued by said company, for the use, benefit, or advantage of the wife, widow, children, father, or mother of any person whose life may be insured by said company, shall not be held or made liable for any debts, contracts or engagements of the person whose life is or may be insured, and all such insurance in the event of the decease of the person whose life is or may be insured, shall be paid to the person or persons named in the policy as beneficiaries therein, or to their assigns or legal representatives, to be held by him, her or them, free and discharged of and from all existing debts, contracts and engagements whatsoever of the said deceased person." We are now satisfied that we were in error in holding in the former opinion that the foregoing provision of appellant's charter presented a legal barrier to the assignment to it by the insured of the policy in question, and also in holding that the charter provision, *supra*, nullified that clause of the policy which says: "This policy is issued and accepted upon the express condition that the insured, James C. Tywman, with the consent of the company, may at any time assign it, or before assignment change the beneficiary therein, or make any other change." We find that the section *supra* of appellant's charter is in meaning and effect the same as sections 654 and 655 of the Kentucky

Statutes of 1903, and the latter but substantial re-enactments of sections 30, 31, and 32 of the general insurance law contained in the act of March 12, 1870: 1 Pub. Acts 1869-70, pp. 71, 72, c. 645; Gen. Stats. 1888, Appendix, pp. 40, 41.

The object of the several sections of the statutes, and also of the provision of appellant's charter ⁵¹⁹ quoted above, is to exempt policies on the life of the husband or father that are made payable to the wife or children from the debts of the insured, or where the policy is made payable to any person having an insurable interest in the life of the insured, to exempt it from the payment of the latter's debts. But as we shall presently see from repeated decisions of this court, such statutes or charter provisions do not interfere with the right of the insured to change the beneficiary, or assign the policy, if the right to do so is expressed or reserved in the policy itself. In other words, the rule that a policy of life insurance vests when issued in the person named in it as the beneficiary, and that because of such vested right it cannot be transferred by the insured to any other person, does not, it would seem, apply where the policy contains a stipulation to the effect that the insured may change the beneficiary. In such a case the right vests conditionally, not absolutely. In *Hopkins v. Hopkins*, 92 Ky. 324, 13 Ky. Law Rep. 707, 17 S. W. 864, we find this doctrine clearly stated in a controversy between husband and wife over a policy issued to the former by the same insurance company appearing as appellant in the case at bar. The policy insured the life of the husband, was made payable at his death to his wife, if living, and if not, to their children. The policy contained a clause, with reference to the right of the insured to assign it or change the beneficiaries, word for word like that of the policy in this case. Hopkins and wife separated, and the action grew out of the refusal of the insurance company to permit the wife, for herself and child, to pay a past due premium on the policy, and to assume the payment of the future premiums, which she claimed the right to do, on the ⁵²⁰ ground that she, as the beneficiary named in the policy, acquired upon its issual a vested right to the policy and the insurance it provided for, and that the clause in the policy authorizing a change of beneficiary was in conflict both with the charter of the company and the general law of the state, and therefore void. In disposing of this contention, the court said: "The general rule is that the

right to a policy of insurance, and the money to become due under it, vest immediately upon its issual in the person named in it as the beneficiary; and that this interest, being vested, cannot be transferred by the insured to any other person: *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41, 32 L. ed. 370. The vested right cannot be divested without the consent of the person invested with it. This is so as to insurance in both mutual and ordinary life insurance companies. This does not hold true, however, where the contract of insurance provides that the insured may change the beneficiary. In such a case it vests conditionally only. The right of the one named in the policy is then subject to be defeated by the terms of the very contract naming him as the beneficiary. It is a condition of the contract, and his right is therefore subject to it." After quoting the same provision of appellant's charter that we have made a part of this opinion, and also quoting the several sections of the General Statutes which are substantially the same as sections 654, 655 of the Statutes of Kentucky, of 1903, the opinion further says: "The clause in the policy relative to a change of beneficiary does not, in our opinion, conflict with these provisions of the company's charter, and the general law. They certainly do not in express terms forbid such a condition in the contract, nor can the prohibition be ⁵²¹ fairly implied. They merely mean that when a married woman is entitled to insurance, or the proceeds of it, it must be held to be her separate estate, and not liable for the debts of her husband or those of the person through whom it was obtained. The insurance is her separate estate so long as it remains payable to her. This, however, does not prevent the insertion of a condition in the contract by which her right to the insurance may be defeated."

In the later cases of *Wirgman v. Miller*, 98 Ky. 620, 17 Ky. Law Rep. 1174, 33 S. W. 937, *Baldwin v. Haydon*, 24 Ky. Law Rep. 900, 70 S. W. 300, *Wrather v. Stacy*, 26 Ky. Law Rep. 683, 82 S. W. 420, the rule announced in *Hopkins v. Hopkins* etc., 92 Ky. 324, 13 Ky. Law Rep. 707, 17 S. W. 864, was approved and followed by the court. So, by the foregoing authorities, it seems to be well settled in this state that where it is provided in a policy of insurance that the insured may change the beneficiary, his right to do so cannot be questioned, and the fact that such right is conferred by the policy prevents it from vesting absolutely in the first

or a subsequent beneficiary. This being true, the several decisions of this court so holding constitute a rule of property which, under the doctrine of stare decisis, should be adhered to in this case. It therefore follows that the insured, James C. Twyman, had the right, without the consent of his wife and sons, to dispose of the policy in question; that is, "at any time to assign it, or before assignment change the beneficiaries therein, or make any other change," with the consent of the insurance company. For, though payable to the wife and children at his death, the reservation in the policy of this right to him prevented it from becoming a policy for their use or ⁵²² benefit, so long as he might continue to live and be capable of exercising such right. The right of the wife and children as beneficiaries was therefore contingent and subject to the right of the insured to dispose of the policy as he saw fit: *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; *Marsh v. Supreme Council etc.*, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; *Sabin v. Phinney*, 134 N. Y. 423, 30 Am. St. Rep. 681, 31 N. E. 1087; *Swift v. Railway etc. B. Assn.*, 96 Ill. 309; *Splawn v. Chew*, 60 Tex. 532; *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458; *Hopkins v. Northwestern Life Assur. Co.*, 99 Fed. 199, 40 C. C. A. 1.

From what has already been said it is hardly necessary to add that we think appellee James C. Twyman had the legal right to borrow money of the appellant insurance company, and to assign to it the policy he held upon his life as collateral security for the payment of the note evidencing the loan, as was done by him, but we are of opinion, notwithstanding his failure to pay the note at its maturity, appellant had not the arbitrary right to forfeit or cancel the policy at its own option, and certainly not upon such an inequitable basis as would deprive the insured of any part of the cash surrender value of the policy in liquidating his debt, if it had such value over and above the debt. Such forfeitures have been condemned by this court. In *New York Life Ins. Co. v. Curry & Bro.*, 115 Ky. 100, 24 Ky. Law Rep. 1930, 103 Am. St. Rep. 297, 72 S. W. 736, 61 L. R. A. 268, the authorities on the subject were reviewed by this court. The facts of that case were that one George Anderson, who was the owner of a paid-up life policy of insurance upon his life for \$630, in the New York Life Insurance Company, payable to his estate, borrowed of that company \$130, and assigned his ⁵²³ policy as collateral security for its payment, upon the

condition that in case of default in any payment of interest on the loan, the company might declare the debt due, cancel the policy, and apply its cash surrender value to the payment of the insured's note and interest. In discussing this provision of the contract between the parties, this court in an opinion by Judge O'Rear said: "That is pure and simple a provision for the forfeiture of the policy upon such terms as the payee of the note may require and at its option. The difference between this and the ordinary unqualified forfeiture lies alone in the extent of the forfeiture. It operates as an enforced conversion without further notice to or consent of the borrower of his collateral, if he promptly fails to pay interest on the debt. The contract of insurance between appellant and Anderson had been fully executed so far as Anderson was concerned. He had paid all that he was required to pay to be entitled to receive from appellant the full sum stipulated to be paid (\$630) at his death. The \$130 was borrowed from appellant since the completion of the contract. The courts have uniformly held in favor of the insurer that agreements for the forfeiture of the policy when premiums were not paid when due are valid, and their enforcement upheld. This is said to be because on the prompt payment of the premium depends the mutuality of the contract and the ability of the insurance company to meet its obligations. But both the reason and the rule are restricted to the matter of premiums alone. Forfeitures are disfavored in law. When they are merely penalties for the nonpayment of borrowed money, they are not allowed. They lead to, and themselves are, unconscionable oppressions of the ⁵²⁴ unfortunate." After quoting with approval the cases of *St. Louis Mutual Life Ins. Co. v. Grigsby*, 10 Bush, 310, *Montgomery v. Phoenix M. L. Ins. Co.*, 14 Bush, 51, *Northwestern M. L. Ins. Co. v. Fort's Admr.*, 82 Ky. 269, 6 Ky. Law Rep. 271, *Mutual Life Ins. Co. v. Jarboe*, 102 Ky. 80, 80 Am. St. Rep. 343, 19 Ky. Law Rep. 1501, 42 S. W. 1097, 39 L. R. A. 504, *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624, 95 Am. St. Rep. 393, 22 Ky. Law Rep. 1282, 60 S. W. 383, 53 L. R. A. 378, and holding that they are in line with the case *supra*, the opinion concludes as follows: "In the case at bar there is no perceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of money had the policy been assigned to the latter as collateral, and a default in payment of the interest had oc-

curred. If it loans money on its policies held by its policyholders, its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds, or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business or charter rights, so far as we are advised, which entitled it to privileges when loaning its money not enjoyed generally by banks, trust companies and other corporations or individuals. We are of opinion that the provision in the loan agreement for a surrender or forfeiture of the policy upon the nonpayment of the interest upon the loan is void."

Applying this principle to the case at bar, the question naturally presents itself, What remedy has the insurance company in a case like this? It cannot sell the policy in satisfaction of the debt, or by suit obtain a decree for its sale, for such sales of insurance ⁵²⁵ policies are forbidden by law. It would manifestly be unjust to require it to remain out of the use of the money due it from the borrower until the death of the latter with the view of then deducting it from the proceeds of the policy, for he might live until the debt would exceed in amount the proceeds of the policy. Originally, the sole purpose of life insurance was to afford indemnity or protection to the family of the insured against poverty and want in case of the loss by death of his services, and for this object alone life insurance companies were primarily created and organized. But under the developing processes of industrial life and commercial expansion the object of life insurance has been extended, so as to allow those who hold policies to pledge or assign them, under proper restrictions, as security for loans to be employed in business adventures and commercial pursuits. Whether such extension of the use of life insurance is a departure from the philanthropic sentiment that gave it birth is not for us to say; it is sufficient to know that it is recognized by the courts, and consequently to be respected and upheld within proper and legal bounds. Having this in mind, and at the same time the advantage possessed by the insurance company over the borrower whose policy is pledged to it as security for a loan, it should be the care of the courts in settling a controversy between the company and the borrower, such as is here presented, to see to it that the insurance company shall not be aided in enforcing an unconscionable bargain exacted of the borrower by reason of

of his necessities. It should be put upon the same plane with other money lenders in making loans to its policy-holders, and the borrower compelled to pay what he may justly owe it, as he would ⁵²⁶ to any other creditor. When the appellee James C. Twyman failed to pay the note due appellant, and accrued interest, according to the terms of the contract, the latter instead of treating such failure as a forfeiture of the assigned policy, and without his consent, arbitrarily fixing its cash surrender value, should, like any other creditor holding a debt secured by lien, have resorted to a court of equity for the enforcement of its rights. Though, in an action for such a purpose, a decree for the sale of the policy, as other collateral or mortgaged property may be sold, would not be allowed, for the sale of a policy of insurance in that way, as already said, is forbidden by law, the court could decree its cancellation upon allowing the insured its full cash surrender value, less appellant's debt.

We are of opinion that an equitable basis for ascertaining the net or surrender value of the policy in controversy is provided by section 653 of the Kentucky Statutes of 1903, and if upon the return of the case to the circuit court appellees by answer insist that the cash surrender value of the policy, in view of its immediate cancellation, is greater than the sum at which it was fixed by appellant, it will be the duty of the court to ascertain such value as provided by section 653 of the statutes *supra*, and if its value as thus ascertained shall be found to exceed the amount of the note, principal and interest due appellant from the insured, the sum left after deducting the amount of such indebtedness, he will be entitled to receive, in money, or, if he so elects, in paid-up insurance of like tenor as the old policy, the amount of the new policy to bear the same ratio to the amount of the old policy as the sum so left bears to the total net value of the old policy. If, however, the insured ⁵²⁷ does not elect to take the paid-up insurance, but accepts in money what, if anything, is found to be due him, the court should decree the cancellation of the policy. If in adjusting the rights of the parties as above directed, it shall be found that the value of the policy is not greater than the debt of the insured, the policy should still be canceled.

For the reasons indicated, the judgment is reversed and cause remanded, with directions to the lower court to over-

rule the demurrer to the petition, and for further proceedings consistent with the opinion.

Paynter, J., dissents.

Cantrill, J., not sitting.

ON PETITION FOR REHEARING.

O'REAR, J. The opinion of the court directs the ascertainment of the cash surrender value of the policy as of the date when the loan from appellant became enforceable. The plan of getting at the amount of this cash surrender value is adopted from the one provided by the legislature in estimating the value of the reserve of life insurance policies. The reserve is the net sum which has been contributed by the policy-holder, out of the employment of which by the insurer the policy would be finally paid off. By section 653 of the Kentucky Statutes a method is provided for ascertaining the minimum value of reserves of life policies. By section 659 of the Kentucky Statutes, it is provided how such reserves are to be valued as single premiums in purchasing paid-up insurance. By reference to these two sections the method which the court adopts for finding the cash surrender value of the policy is ⁵²⁸ found. Of course if there are "dividends," so called, in which the policy was also entitled to participate in addition to the "reserve," that fact would have to be considered also in arriving at what would be a fair cash surrender value of the policy.

The Principal Case is affirmed in the subsequent case of *Grice v. Illinois Life Ins. Co.*, 122 Ky. 572, post, p. 489. For a farther discussion of assignments of life insurance policies as collateral security, see the note to *Chamberlain v. Butler*, 87 Am. St. Rep. 510.

DAVIS v. CHESAPEAKE AND OHIO RAILWAY COMPANY.

[122 Ky. 528, 92 S. W. 339.]

CARRIER—Who are Passengers.—An Express Messenger, carried by a railroad company in a car for the transportation of express matter under a contract with the express company, is a passenger for hire. (pp. 482, 483.)

CARRIER—Contract Releasing Liability to Express Messenger. A contract entered into in Virginia whereby an express messenger at the time of his employment releases the express company and the railway company from all claims for injuries he may receive, through negligence or otherwise, which contract is intended to operate in Virginia, Kentucky and other states, is void under the provisions of the Kentucky constitution that no common carrier shall contract for relief from its common-law liability, and does not affect his right to recover for injuries sustained in that state. (p. 488.)

Davis & Matthews, Scott & Dinkle and D. C. T. Davis, for the appellee.

Worthington & Cochran, for the appellee.

533 **PAYNTER, J.** The appellant, Davis, was employed by the Adams Express Company as a messenger. Under a contract which the Adams Express Company had with the appellee, his duties required him to go upon appellee's trains to look after packages and property which it was transporting under its contract with the express company. While on one of appellee's trains in the discharge of his duties he was injured by the alleged negligence and carelessness of appellee. The principal defense relied on is a contract of release which the Adams Express Company required the appellant to execute upon entering its service. The preamble of the contract recites that he had applied to the express company for employment as a servant at a fixed compensation; that his duties were to take charge of goods which the express company transported upon cars and other conveyances of railroad companies; that the railroad companies required of the express company, as a condition of their permitting passengers to travel upon their trains in the performance of duties, that they should be indemnified and released from all liability for and in respect of any damage or injury which might be sustained by him in the course of his employment, whether the same be occasioned by the negligence of the railroad company or otherwise. The contract of release contains the following stipulations: "Now, therefore, in consideration of such em-

ployment to be given by the said express company, and the compensation to be paid therefor, and in consideration of one dollar, lawful money of the United States of America, paid by the Adams Express ⁵³⁴ Company to the undersigned, the receipt whereof is hereby acknowledged, the undersigned for himself, his heirs, executors, administrators, and assigns, hereby fully consents to and ratifies each and every bond or other instrument or contract of indemnity against such liability, and each and every release of said liability or other similar contracts executed and to be executed by the said express company to any railroad or other carrier, and the undersigned agrees to assume all risks of death or accident, or damage to him, or to his or any of his property, and does hereby release and discharge said Adams Express Company and any connecting carrier, railroad company, express company, or other company or person or connecting carrier in whose car or other conveyances he may travel in the performance of his duties as aforesaid, from any and all claims, liabilities and demands of every kind, nature and description, for or on account of his death or any injury or damage to his person or property of any kind or nature sustained by the undersigned, whether caused by the negligence of the said Adams Express Company, or any of the said railroad companies or other carriers or otherwise." The contract was executed in Virginia, and the injury of which he complains was received in Kentucky. The court below held that the contract was enforceable, hence appellant's right to recover was denied.

For the appellant it is urged that the contract is against public policy and is declared invalid both by the code in Virginia and also by section 196 of the constitution of Kentucky, for each denies the right of a common carrier to contract for relief from common-law liability. For the appellee it is insisted that the rule of public policy which renders invalid ⁵³⁵ stipulations by common carriers restricting their liability for loss occasioned by their negligence does not apply when they engage to do some thing which it is not under obligation as a common carrier to do, and that when it enters into a contract as a private carrier for hire, it may exempt itself, by contract, from liability for its negligence, or that of its servants or agents. While there is some conflict in the authorities on the question, we are of the opinion that the courts which hold that an express messenger though carried

in a special car, under a contract with the express company for transportation of express matter, announce the correct doctrine in holding that they are passengers for hire. The sum which the express company pays the railroad company for conducting its express business, on its cars, over its line of railway is necessarily, in part, for the transportation of the express messenger. The express messenger is not a trespasser, because he is being transported by the railroad company under a contract and for the same reason he is not a licensee. He is an employé of the express company and not of the railroad company. If he is not a trespasser or a licensee or an employé of the railroad company, he must necessarily be a passenger. While the railroad company could not be compelled to enter into a contract by which it would receive into the express car the messenger of the express company and thus transport him, still when he does agree to, and does receive him on that car for transportation, though his business is to look after express matter, he is being transported for compensation; hence, as a passenger for hire: *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597; *Blair v. Erie R. R. Co.*, 66 N. Y. 313, 536 23 Am. Rep. 55; *Brewer v. New York etc. R. R. Co.*, 124 N. Y. 59, 21 Am. St. Rep. 647, 26 N. E. 324, 11 L. R. A. 483; *Kenney v. New York etc. R. R. Co.*, 125 N. Y. 422, 26 N. E. 626; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Kentucky C. R. R. Co. v. Thomas' Admr.*, 79 Ky. 160, 42 Am. Rep. 208, 2 Ky. Law Rep. 114; *Jones v. St. Louis Ry. Co.*, 125 Mo. 666, 46 Am. St. Rep. 514, 28 S. W. 883, 26 L. R. A. 718; *Yeomans v. Contra Costa S. Navigation Co.*, 44 Cal. 71; *Cleveland etc. R. R. Co. v. Ketcham*, 133 Ind. 346, 36 Am. St. Rep. 550, 33 N. E. 116, 19 L. R. A. 339; *Chamberlain v. Milwaukee R. R. Co.*, 11 Wis. 238; *Gulf etc. R. R. Co. v. Wilson*, 79 Tex. 371, 23 Am. St. Rep. 345, 15 S. W. 280, 11 L. R. A. 486.

It is said in *Hutchison on Carriers*, section 554: "It seems that if the person who is injured by the negligence of the employés of the carrier is lawfully upon its conveyance, under a contract which does not make him an employé or servant of the company, he will be entitled to the same care and diligence for his safety as one who is strictly a passenger. Thus where one was upon a train as an express messenger, carrying express freight, under contract with the company, by which he was entitled to be carried, without a distinct price for his passage, and was injured by the negli-

gence of the company's agents in the management of the train, or in putting obstructions in its way, it was held that such messenger was entitled to the same care and circumspection on the part of the company and its agents in his carriage as if he had been traveling upon the train as a passenger, who had paid a distinct price for his transportation." In 3 Thompson on Negligence, section 2651, it is said: "In respect of the measure of duty which the carrier owes him and his right of recovery for an injury happening through ⁵³⁷ the negligence of the carrier's servants, an express messenger stands on the same footing as a United States postal clerk. He is on the carrier's vehicle lawfully, and for a consideration paid by the company, and his legal rights are therefore those of a passenger for hire." In section 1578, volume 4 of Elliott on Railroads, it is said: "The courts have held the relation of carrier and passenger to exist in cases of mail agents, or postal clerks, and a similar rule is declared as to express messengers."

In the case of *Kentucky Central R. R. Co. v. Thomas' Admr.*, 79 Ky. 160, 42 Am. Rep. 208, 2 Ky. Law Rep. 114, the party killed by the railroad accident was an express messenger and the court in speaking of the relation he sustained to the railroad company said: "That the intestate was a passenger and entitled to the privileges and subject to the duties incident to that relation, is not disputed." In the case of *Louisville & Nashville R. R. Co. v. Kingman*, 18 Ky. Law Rep. 82, 35 S. W. 264, this court held that a postal clerk carried by a railroad company, under its contract with the government, is to be treated as a passenger, as regards the liability of the company for injuries received by him while being thus carried.

Having concluded that an express messenger is a passenger for hire, the question remains: What effect has the contract in question upon his claim for damages resulting from the alleged negligence of the appellee? Section 1296 of the Virginia code of 1887 reads as follows: "No agreement made by a common carrier for exemption from liability, for injury or loss, occasioned by his own neglect or misconduct shall be valid." Section 196 of the constitution of Kentucky reads as follows: "No ⁵³⁸ common carrier shall be permitted to contract for relief from its common-law liability." Thus we have a declaration from the state of Virginia, through its legislature, and the state of Kentucky, through its organic

law, as to their public policy with reference to the right of a common carrier to contract for relief from its acts of negligence. Under the Virginia code, a common carrier cannot contract for exemption from liability for injury or loss occasioned by its own negligence or misconduct. Neither under the Virginia code nor the constitution of this state is the contract in question enforceable, if it is an effort upon the part of appellee to be relieved thereby of liability, to a passenger for hire, who is alleged to have been injured by its negligence, or that of its agents or servants. Before the enactment of the Virginia code and the adoption of the constitutional provision of this state, such a contract would not have been valid at common law in either state. From the nature of the business of the Adams Express Company and the duties to be performed by its messengers, and the fact that the appellee conducted an interstate business, shows that the parties attempted to relieve themselves from liability for negligent acts whether they occurred in Virginia or Kentucky.

So the parties to the contract contemplated that it should operate both in Virginia and Kentucky, and in any other state through which the carrier ran and express matter was carried. The alleged negligent act was committed in Kentucky, therefore the cause of action arose in this state, and the appellee is relying upon a contract that was to operate in Virginia as well as Kentucky, for relief against its alleged negligent act. In the case of *Cleveland C. C. & St. L. Ry. Co. v. Druen*, 118 Ky. 237, 26 ⁵³⁹ Ky. Law Rep. 108, 80 S. W. 778, 66 L. R. A. 275, the court had under consideration the question as to the effect of a contract made in another state and to be performed, in part, in this state, and which, if made in this state, would have been against public policy, and the court said: "But as to that part of the contract that is to be performed in Kentucky, it will be read in the light of the laws and constitution of this state, and be construed and applied accordingly. It will be conclusively presumed that the parties so intended, and that, therefore, the provision limiting the carrier's common-law liability was not intended to apply to that part of the shipment that was to be performed here, for the court will not presume that the parties intended either a vain or illegal thing. That contracts to be performed partly in two states will be construed according to the laws of each of the states relating to the portions to be performed there respectively is sustained

in Bishop on Contracts, section 1394. If shipper and carrier, by entering into the contract beyond this state, would incorporate binding provisions in it, limiting the duties and liabilities of carriers in this state, notwithstanding the prohibition of the constitution, it would be to put the bargains of individuals above the organic laws, and to substitute them to that public policy exercised by the state for the best welfare of the whole people of an organized society. This they ought not, and will not, be permitted to do." Our conclusion is that the contract is not only against the public policy of Virginia, but also of Kentucky. If it were valid under the Virginia code, it would not be valid here, because the cause of action arose in this state, and the contract was intended to relieve the appellee from its negligent act in Kentucky.

⁵⁴⁰ We will consider briefly the claim of appellee, that in contracting to haul the messenger and goods of the express company, it was not contracting as a common carrier, but as a private carrier. This position is sustained by the case of *Baltimore & O. R. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560, and the opinions of courts in some other jurisdictions. It may be true (but the question is not before us) that an express company could not compel railroad companies to provide an express-car for the transportation of its messengers and packages, but having made the contract and proceeds to execute it by transporting the messenger and its packages does not deprive it of its character as a common carrier. It carries the messenger and packages for hire. The railroad company is a common carrier by virtue of the business it conducts, and not by virtue of the responsibilities which may be placed upon it by law, or its contracts. The mere fact that it makes some special arrangement with some person or company for the transportation of persons, or property, over its line, in a particular way or under certain conditions, does not deprive it of its character as a common carrier, or convert it into a bailee for hire. The case of *Greenwich Ins. Co. v. Louisville & Nashville R. R. Co.*, 112 Ky. 598, 99 Am. St. Rep. 313, 23 Ky. Law Rep. 2014, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, is not in conflict with the conclusion we have reached. There, the contract under consideration was not for the transportation of passengers or goods, but was a contract by the railroad company giving its permission to the erection of

a building upon its right of way, upon certain conditions, hence, the court held the contract was not made with reference to its business as a common ⁵⁴¹ carrier. In the case of *New York C. R. R. Co. v. Lockwood*, 17 Wall. 359, 21 L. ed. 627, the question arose as to the liability of the railroad company to a drover, who under a special arrangement rode upon a freight train to look after stock which was being carried thereon. The contract with the drover provided that the carrier was not to be liable to him for injuries resulting from its negligence, and the court said: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character, and becomes an ordinary bailee for hire, and therefore may make any contract he pleases; that is, he may make any contract whatever, because he is an ordinary bailee, and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God, or public enemies. The civil law excepts also losses by means of any superior force, and any inevitable accidents. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced that a special contract as to the terms and responsibilities of carriers changes the nature of the employment is calculated to mislead. The responsibilities of a ⁵⁴² common carrier may be reduced to those of an ordinary bailee for hire, while the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes risks of inevitable accidents in the carriage of his goods? Suppose that the contract relates to single crate of glass or crockery, while at the same time the carrier receives from

the same person twenty other parcels, respecting which no such contract is made, is the company a public carrier as to the twenty parcels, and a private carrier as to the one? On this point there are several authorities which support our view, some of which are noted in the margin. A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regular established business for carrying all of certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier and a special contract about ⁵⁴³ its responsibilities does not divest it of the character."

The drover in this case could have compelled the railroad company to have accepted his fare and transported him on its passenger trains as a passenger, and the mere fact that it agreed to do so on a freight train did not deprive him of his relation to the railroad as a passenger. The express messenger could have compelled the railroad company to have accepted fare and transported him upon a passenger train. The mere fact that it did so in the express-car did not deprive him of his relation to the railroad company as a passenger entitled to all the relief which the law guaranteed him. In the case of *Baltimore & O. S. W. Ry. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560, the supreme court endeavored to distinguish that case from *New York C. R. R. Co. v. Lockwood*, 17 Wall. 359, 21 L. ed. 627. In our opinion the reasoning in the Lockwood case applies with great force to the case under consideration. Several of the supreme courts of the states have taken the view of the law that we have herein expressed. In our opinion, the contract under consideration is against public policy, and not enforceable.

The judgment is reversed for proceedings consistent with this opinion.

The Relation of Express Companies and Their Employés to other carriers is discussed in the note to Pittsburgh etc. Ry. Co. v. Mahoney, 62 Am. St. Rep. 513. The question whether express messengers are passengers is considered in the note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 98. It has been decided in Wisconsin that an express messenger is not a passenger of the railway company, and that it may by contract relieve itself from liability for negligence toward him while riding on its trains: Peterson v. Chicago etc. Ry. Co., 119 Wis. 197, 100 Am. St. Rep. 879, and see the cases cited in the cross-reference note thereto; and in Illinois it has been held that a contract of employment as porter for a sleeping-car company which releases the railroad company from liability for injuries to him is not against public policy: Chicago etc. Ry. v. Hamler, 215 Ill. 525, 106 Am. St. Rep. 187.

CRICE v. ILLINOIS LIFE INSURANCE COMPANY.

[122 Ky. 572, 92 S. W. 560.]

LIFE INSURANCE—Right to Pledge Policy.—One who takes out a policy of insurance on his life in which his wife is named as beneficiary, and which provides for an assignment or change of beneficiaries with the consent of the company, may, without her consent, assign it to the company as collateral security for a loan, and, when the debt is due, surrender the policy at its cash value to the company in payment. (p. 492.)

John W. Ray, for the appellant.

Robbins & Thomas and Long & Rice, for the appellee.

573 SETTLE, J. On the sixth day of February, 1900, the Mutual Life Insurance Company of Kentucky, in consideration **574** of fifty-four dollars and seventy-eight cents then paid it, by Frederick G. Crice, and his undertaking to thereafter annually pay it, on the same date, a like sum, issued and delivered to him a policy of insurance on his life, numbered 32,000, whereby it agreed to pay at his death, to his wife, the appellant, Elizabeth Crice, the sum of two thousand dollars. By a written contract of date August 1, 1902, the Mutual Life Insurance Company of Kentucky, for a valuable consideration, and with the approval of its policy-holders, sold and assigned its assets, premium lists, and property of every kind to the appellee, Illinois Life Insurance Company, and the latter company thereby became subrogated to its rights, assumed its liabilities to the holders of its policies, and issued to each of them a certificate to that effect. The Mutual Life Insurance Company of Kentucky then quit busi-

ness, and the premiums that were thereafter paid on the policies it had issued were received from the policy-holders by the Illinois Life Insurance Company. The policy of two thousand dollars on the life of Frederick G. Crice was of the number upon which the latter company, under its contract with the Mutual Life Insurance Company of Kentucky, became liable. On August 7, 1904, Frederick G. Crice died in Ballard county, and shortly thereafter his widow, the appellant, Elizabeth Crice, instituted this action against appellee in the Ballard circuit court to recover of it two thousand dollars, the amount of insurance specified in the policy referred to; it being alleged in the petition that the policy, though in appellee's possession at the time of her husband's death, was then in full force, that appellee by virtue of its contract with the Mutual Life Insurance Company of Kentucky assumed its payment, and is liable therefor, and that ⁵⁷⁵ appellant, as the beneficiary named in the policy, is entitled to its proceeds. The answer of appellee admits the contract with the Mutual Life Insurance Company, and its undertaking to carry out the contracts of that company with its policy-holders, including Frederick G. Crice, and also admits its possession of the policy in controversy, but denies any liability thereon, or that it was in force at the time of his death. It is averred in the answer that, after the payment by Frederick G. Crice of four annual premiums upon the policy in question, he borrowed of appellee one hundred and five dollars, for which he at the time executed to it his promissory note of date May 14, 1903, due one year thereafter, and to secure its payment assigned and delivered to appellee the policy in controversy, as permitted by a clause in the policy containing this provision: "This policy is issued and accepted upon the express condition that the said Frederick G. Crice may, with the consent of the company, at any time assign it, or before assignment, change the beneficiaries therein, or make any other change." The answer contains, in substance, the further averments that, after thus executing to appellee his note for the one hundred and five dollars borrowed of it, and assigning his policy of insurance as collateral security for its payment, Frederick G. Crice failed to pay the annual premiums on the policy which became due February 6, 1904, and by reason thereof the policy by its terms lapsed and became void, except as to its cash value, which at the time of the default in the payment of the pre-

miums was one hundred and eighteen dollars, and that on April 25, 1904, Frederick G. Crice notified appellee that he had determined, instead of reviving the policy, to accept its cash or surrender value, of one hundred and eighteen dollars, and ⁵⁷⁶ appellee at his request settled with him upon that basis, and, after deducting the note of one hundred and five dollars he owed appellee, there was left due him of the cash surrender value of the policy thirteen dollars, and this amount appellee then paid him, upon receiving which the insured executed to appellee a formal receipt and full release, and surrendered to it the policy in question, which was then and there canceled. Appellant demurred to the answer and to each paragraph thereof. The demurrers were overruled by the lower court. Appellant refusing to plead further, and having elected to stand upon the demurrer, judgment was entered dismissing the action at her costs, and she has appealed.

It is insisted for appellant that the lower court erred in overruling the demurrer, and this contention is bottomed upon the theory that she, as the beneficiary named in the policy, upon its issual, took a vested interest therein, of which she could not be deprived by the act of the insured in assigning it as collateral security for a loan made him by the company, or by later surrendering it for its cash value for cancellation, as neither the assignment nor surrender of the policy was with her consent. It is also argued, in her behalf, that her interest in the policy and right to its proceeds is protected by section 654 of the Kentucky Statutes of 1903, which declares, in substance, that a policy of insurance on the life of any person expressed to be for the benefit of, or duly assigned, transferred, or made payable to, any married woman, or to any person in trust for her, or for her benefit, by whomsoever such transfer may be made, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, ⁵⁷⁷ or any other person transferring the same, or his creditors.

We are unable to sustain these contentions of counsel. In discussing the question under consideration this court, in *Hopkins v. Hopkins' Admr.*, 92 Ky. 324, 13 Ky. Law Rep. 707, 17 S. W. 864, said: "The general rule is that the right to a policy of insurance, and the money to become due under it, vests immediately upon its issual in the person named in it as the beneficiary, and that this interest, being vested, can-

not be transferred by the insured to any other person: *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41, 32 L. ed. 370. The vested right cannot be divested without the consent of the person invested with it. This is so as to insurance in both mutual and ordinary life insurance companies. This does not hold true, however, where the contract of insurance provides that the insured may change the beneficiary. In such case it vests conditionally only. The right of the one named in the policy is then subject to be defeated by the terms of the very contract naming him as the beneficiary. It is a condition of the contract, and his right is therefore subject to it." In considering the statute upon which counsel for appellant relies, the court in the opinion, *supra*, also declared: "The clause in the policy relative to change of beneficiary does not, in our opinion, conflict with the provisions of the company's charter and the general law. They certainly do not in express terms forbid such a condition in the contract, nor can the prohibition be fairly implied. They merely mean that, when a married woman is entitled to insurance, or the proceeds of it, it must be held to be her separate estate, and not liable for ⁵⁷⁸ the debts of the husband, of those of the person through whom it was obtained. The insurance is her separate estate so long as it remains payable to her. This, however, does not prevent the insertion of a condition in the contract by which her right to the insurance may be defeated." In *Wirgman v. Miller*, 98 Ky. 620, 17 Ky. Law Rep. 1174, 33 S. W. 937, and *Wrather v. Stacy*, 26 Ky. Law Rep. 683, 82 S. W. 420, the view of the law expressed in *Hopkins v. Hopkins' Admr.* was adhered to, and in the very recent case of *Mutual Life Ins. Co. of Kentucky v. Twyman*, 122 Ky. 513, 28 Ky. Law Rep. 1153, ante, p. 471, 92 S. W. 335, the court, after a careful consideration of the question here presented and an elaborate review of the authorities, withdrew the first opinion, which may be found in 28 Ky. Law Rep. 167, 89 S. W. 178, and came to the conclusion that it would be unwise to depart from the doctrine announced in the cases *supra*.

In the case at bar the policy in express terms conferred upon the insured the right, with the consent of the company, at any time, "to assign it, or, before assignment, change the beneficiary therein, or make any other change," and this right is not in any way made to depend upon the consent of the beneficiary named in the policy. It is alleged in the an-

swer, and admitted by the demurrer, that the insured did in fact assign the policy to appellee as collateral security, for the payment of his note, executed for money borrowed of it. He clearly had the right to make use of the policy, though without the knowledge or consent of appellant, whose interest in it as the named beneficiary was subject to his superior right to so use it.

579 It is likewise alleged in the answer, and admitted by the demurrer, that, after assigning the policy to secure the payment of his note to appellee, the insured voluntarily surrendered it for cancellation, by means of which he paid his note to appellee and received the full cash surrender value of the policy, which exceeded the amount of the note by thirteen dollars. He clearly had the right to so dispose of the policy without the consent of appellant. This settlement is not attacked by appellant, and no claim is made by her that it was procured by fraud on the part of appellee, or its agents, nor is it claimed by her that the amount allowed the insured as the cash surrender value was inadequate.

Our examination of the record affords us no ground for disturbing the judgment complained of.

Wherefore it is affirmed.

The Principal Case affirms the previous decision of the Kentucky court in *Mutual Life Ins. Co. v. Twyman*, 122 Ky. 513, ante, p. 471, and see the authorities cited in the cross-reference note thereto.

SANDERS v. HERNDON.

[122 Ky. 760, 93 S. W. 14.]

SURETYSHIP—Enforcement of Contribution.—A surety who has paid a judgment against himself and his cosureties may have execution thereon in his favor against one of them who, as to him, is a principal under the statutes. (p. 496.)

SURETYSHIP—Contribution—Joint Execution.—A statute requiring that an execution on a joint judgment shall be joint does not prevent a surety who has paid a judgment from having it assigned, and having execution upon it against the principal for the whole of it, or against any of the cosureties for their sharers of it. (p. 496.)

GARNISHMENT.—The Compensation Due an Administrator may be reached by garnishment for his individual debt, but service of the attachment upon the clerk, as permitted in attaching a fund in court, does not create any lien on funds of the estate in the hands of the administrator. (p. 501.)

J. W. Alcorn and Lewis L. Walker, for the appellants.

C. B. Swinebroad, J. M. Rothwell, R. H. Tomlinson and M. C. Saufley, for the appellees.

⁷⁶² O'REAR, J. Appellants, together with G. M. Patterson, J. B. Conn, R. G. Ward, J. J. Barton, J. B. Kinnaird, William H. Kinnaird, and William Herndon, were jointly bound as sureties for the Lancaster Oil Company upon a note for five thousand dollars, executed to the National Bank of Lancaster, Kentucky. The bank sued all the makers of the note and recovered judgment against them. Appellants paid off the judgment and took an assignment of it to themselves. Thereafter appellants caused an execution to be issued upon the judgment in behalf of the bank, indorsed for their benefit, against all of the obligors in the note excepting themselves and William H. Kinnaird, for the sum of five thousand dollars. This execution was placed in the hands of the sheriff of Garrard county, and returned "No property found." Whereupon appellants filed a ⁷⁶³ petition in equity against appellee William Herndon and the National Bank of Lancaster as a garnishee defendant, and against William Herndon, administrator of M. W. Johnson, deceased, proceeded against also as a garnishee defendant, attaching whatever might be owing to William Herndon by the garnishees to the extent necessary to satisfy Herndon's liabilities on account of the discharge of the debt made by him. The bank answered that it owed the defendant Herndon five hundred and two dollars and eighty-one cents, and that Herndon, as administrator of M. W. Johnson, had on deposit in the bank as administrator aforesaid the sum of twelve thousand seven hundred and fifty dollars and thirteen cents. It is charged in the petition that Herndon, who is sued by appellants as principal debtor, was then the administrator of the estate of M. W. Johnson, deceased; that there had passed through his hands as such administrator about thirty-five thousand dollars of assets, collected and disbursed; that he had not been paid anything for his services, but that his claim for compensation was then pending and undetermined in a suit in the Garrard circuit court to settle the estate of Johnson. Attachment was served upon the clerk of the court, properly indorsed, so as to create a lien upon the fund in the hands of the administrator owing to himself from the estate of his intestate, if such fund should be deemed a fund in court, and to subject it to the payment

of the plaintiff's debt sued on. A demurrer was sustained to the petition, and it was dismissed.

Two questions are argued in briefs as being presented by this ruling of the court: One, whether the execution upon which the return of no property was made, and which was the basis of this equitable action, instituted under section 439 of the Civil Code of Practice, ⁷⁶⁴ was void; it being asserted by appellees, and evidently held by the circuit court, that it was void. The second is whether a defendant may be made garnishee, when summoned as such in a different capacity, in a personal action against him for debt. The petition in this case alleges that appellant signed the note sued upon at the instance of appellee William Herndon, as his surety; that he undertook to indemnify them wholly against loss on account of their suretyship. The petition shows that the principal in the debt was the oil company, and that the other obligors were sureties to the bank, but that as between appellants and appellee Herndon, Herndon was principal to appellants. By section 4665 of the Kentucky Statutes of 1903, if a surety pays the whole or any part of a debt or liability for which he is bound as such, he may recover the amount, with interest from time of payment, from the principal, by an action at law. He may also sue a cosurety, separately or as a joint defendant with the principal, in such proceeding, and in like manner recover judgment against him, separately or jointly, at the same time, for his proper part of the debt or liability so paid, as if the sureties were the sole obligors. Section 4666 of Kentucky Statutes of 1903 applies to sureties who have paid a judgment rendered upon a debt to which they were parties. It allows such judgment to be assigned for the benefit of the surety or sureties so paying it, and it gives to them control of the judgment for their benefit against the other defendants, so far as to obtain satisfaction from the principal for the whole amount so paid by the sureties with interest, or from any cosurety his proper part of such payment according to the principles stated in section 4665. These sections ⁷⁶⁵ of the statute were not intended to restrict, but to enlarge, the equitable doctrine of substitution and the common-law doctrine of contribution: *Kellar v. Williams*, 10 Bush, 216.

It is settled that sureties may be bound as among themselves in different measures of liability: *Daniel v. Ballard*, 2 Dana, 296. All are bound, of course, for the whole debt to the ob-

ligee, yet as between principal and sureties the principal alone is bound for the whole of it. Generally as among sureties they are equally bound, excepting that, if some are insolvent or nonresidents, those who are solvent are equally bound, without respect to those who are insolvent or beyond the court's jurisdiction. The sureties may nevertheless contract among themselves for a different proportion of liability, which will be respected and enforced by the courts. The statutes above cited were aimed to provide a speedy and simple method of enforcing such liability as among the sureties. If one surety pays more than his just part of the liability, the others who were bound to the obligee, and whose obligation to the obligee was thereby extinguished, ought to make whole the one who had discharged their liability, and this according to the terms of the contract as between themselves. The statute, which gives to a surety who paid off a judgment the right to have the judgment assigned to him and to control subsequent issues of the execution upon it, is an enlargement upon the common-law remedy—is a summary action. It is more or less open to initial abuse; that is, a surety may claim that another who merely appears as a joint debtor is in fact his ⁷⁶⁶ principal, and liable to him for the whole of the debt, may cause an execution to be issued and to be indorsed in favor of the surety who has paid the judgment, and direct it to be made entirely out of the property of the other obligor, whom he may designate as principal. For it is a matter of common experience that such obligations generally do not show who are principals and who are sureties. Consequently, judgments rendered upon them would also fail to show the character of the obligors. Notwithstanding all this, the person proceeded against by the surety paying off the judgment is not without remedy. He may have such execution quashed by the court out of which it is issued, if it is issued wrongfully, or if more is being attempted to be collected upon it than is justly owing by the complainant. But when he stands by and allows the execution to issue against him for the whole amount, he will not be heard to say that the execution is void. It is not. It is expressly allowed by the statute. The remedy of such complainant is by direct attack upon it, or by any equitable defense made in the proceeding based upon a return of "no property found" under the execution.

The execution is said to be void for another reason. Subsection 2 of section 1652 of the Kentucky Statutes of 1903

(title "Executions"), requires that an execution on a joint judgment against several must be joint. This section relates to an execution issued upon a judgment rendered in favor of the person in whose name the execution is issued. It would be in conflict with section 4666 otherwise; for that section expressly allows a surety who had paid a judgment to have it assigned, and have an execution issued upon it against the principal for the whole of it, or against any of the ⁷⁶⁷ co-sureties for their share of it. From the nature of the case, such an execution could not be joint. Section 4666 must be construed as an exception to the requirements of subsection 2 of section 1652.

The other question raised in the argument is made more difficult by the conflict of authorities elsewhere and the absence of precedent in this state. The estate of M. W. Johnson, an intestate, had been committed by a court of competent jurisdiction to the defendant Herndon for administration. There came to his hands personal assets to be administered, for which the estate owed him a reasonable money consideration, within the statutory maximum of seventeen hundred and fifty dollars or less, as might be determined by the court wherein his final settlement should be made. This compensation was due him in money for services rendered to the estate, and was wholly unpaid. It was not exempt per se from liability for his debts. On the contrary, it ought to be liable therefor precisely as any other chose in action which may have belonged to him. He is, by the admission of the demurrer, not only in default to his creditor, but entitled to receive a considerable sum from Johnson's estate, owing to him personally and then due, which, could the court's process lay hold upon it, ought, in law as in morals, to be applied to the payment of his debt. The defense is an issue of law presented, which is that the law's process is ineffectual to reach this debt or fund. The reasoning is that, as the defendant owes himself the debt, the presumption is that it has been discharged; or if that presumption be not indulged, that the judgment to be rendered against him as garnishee would be for so much money, which would be fully covered by the judgment against him as debtor. If the object of the ⁷⁶⁸ law was to aid the debtor in avoiding the payment of his debts, the reasoning would seem to answer the purpose. On the contrary, though, the statutes and practice in attachments and garnishee process is to aid the creditor in collecting debts

from unwilling debtors. The court's office is to carry out this purpose in construing statutes when their terms will admit it.

Our code allows that every person who is indebted to the defendant, sued in an action to recover money, or who holds property for him, may be summoned as garnishee, and be compelled to disclose the amount owing to, or the property held for, the defendant, which upon such disclosure may be subjected in that action toward the satisfaction of the debt sued on: Civ. Code Prac., sec. 225. On grounds of public policy, salaries of officials serving the public are not liable to attachment: *Webb v. McCauley*, 4 Bush, 8; *Allen v. Russell*, 78 Ky. 105; *Bridgeford v. Keenehan*, 8 Ky. Law Rep. 268; *Dickinson v. Johnson*, 110 Ky. 236, 22 Ky. Law Rep. 1686, 96 Am. St. Rep. 434, 54 L. R. A. 566, 61 S. W. 267. Pensions granted by the federal government to disabled soldiers or their dependents are likewise not liable, because the federal government may not be sued or summoned as garnishee, but not because the money is exempt from debt after it reaches the pensioner's hands: U. S. Rev. Stats. (U. S. Comp. Stats. 1901, p. 3279), sec. 4747; *Moxley v. Andrews*, 5 Ky. Law Rep. 425; *Robion v. Walker*, 82 Ky. 60, 5 Ky. Law Rep. 799, 56 Am. Rep. 878; *Herreld v. Skillem's Assignee*, 6 Ky. Law Rep. 666; *Carter & Co. v. Strange*, 7 Ky. Law Rep. 302; *Sims v. Walsham*, 9 Ky. Law Rep. 912, 7 S. W. 557; *Suter v. Stamper*, 6 Ky. Law Rep. 745; *Johnson v. Elkins*, 90 Ky. 163, 11 Ky. Law Rep. 967, 13 S. W. 448, 8 L. R. A. 552; *Eckert v. McKee*, 72 Ky. 355; *Hudspeth v. Harrison*, 6 Ky. Law Rep. 304; *Ashler v. Terry*, 6 Ky. Law Rep. 745. But administrators and other personal representatives are not public officials serving the public. The public welfare is not involved in their ability to maintain themselves upon their salaries or allowances whilst engaged in the duties of their positions; no more so than trustees of private trusts, or agents and servants of private corporations. It is not true, strictly, that an administrator of a decedent's estate is, in law, the same person as the individual. The estate of the decedent which he is administering does not belong to him, although its legal title is invested in him for certain purposes. At common law it was once held that one who became administrator or executor of a decedent thereby extinguished any debt owing him by such decedent, for it was thought impossible for a man to be debtor to himself. That unjust requirement has long

since been abandoned. In its stead it is recognized that a personal representative as such may be indebted to himself as an individual. It is an every-day occurrence in practical application that decedents' estates are indebted to their personal representatives, and the indebtedness enforced by the law's process. No good reason is presented why, if the law can do this much for the creditor administrator against the estate which he has in custody, it may not do as much for his creditor through the application of garnishee process. The decedent's estate is deemed a separate entity, and is liable only for the obligations of the decedent, or such as are imposed upon it by statute. ⁷⁷⁰ A judgment against the estate is to be satisfied alone out of its assets, without regard to the solvency of the personal representative. The latter is the law's custodian of the decedent's estate, to disburse it according to its liabilities only. He gives bond to the commonwealth for the benefit of all persons concerned for the proper application by him of the assets. He has not the right to mingle it with his own, or to become its debtor by personally appropriating it. His liability to the estate for its assets received is not a liability from himself to himself. A fortiori, the liability of the estate to its personal representative is not a debt owing by one to himself. If he is sued upon his personal obligation, his answer cannot concern the trust estate in his custody, nor would a judgment rendered thereon against him bind in any way the assets of the decedent's estate in his hands for administration. On the other hand, if he is sued as personal representative upon an obligation of the estate, the judgment against him would concern the estate alone—would have to be satisfied out of its assets. Whether he could sue himself is not the question, but it is whether there is money owing to him not exempt by law from seizure for his debts. If summoned as administrator as garnishee in a suit against him for debt by his personal creditor, he ought to answer truthfully as administrator what sum he owes. His admission of liability obviously would not be conclusive against the estate. No more would his assertion of a claim against the estate for debt, or for an allowance for his services. In each instance the court would hear proof, and from it fix the amount due. The judgment would exonerate the estate to that extent from further liability on account ⁷⁷¹ of such services. The administrator should be adjudged to pay it out of unadministered assets in his hands as such administrator, pro rata with debts

of equal dignity. Should he fail to do it because he had previously appropriated the assets of the estate to his own use or squandered them, his bond would be liable; for, until the value of his services is ascertained by a competent tribunal, and ordered paid, he had not the right to pay for them. In such transaction he could not represent both the estate and himself. In that the court making the settlement must needs represent the estate in requiring proof of the nature and value of the services to be allowed and paid for.

There are but two cases which we have found bearing on this question. One is *Shepherd v. Bridenstine*, 80 Iowa, 225, 45 N. W. 746. The supreme court of Iowa thus stated and answered the question: "Where the indebtedness is unconditional, and not dependent on any contingency, and is due, it has always been the practice in this state to render an unconditional judgment against the garnishee. Suppose that in this case judgment should be rendered against the defendant in her representative capacity, and she should refuse to pay it, what remedy would the plaintiff have, other than another execution against the defendant? It is claimed that the sureties on the defendant's bond would be liable; but sureties on such bonds are liable only for maladministration, or for failure to perform orders in probate. The case is an anomaly. All the statutes in this state, and all the law upon the subject, contemplate that there are three persons to every garnishment proceeding." The court concluded: "We are clearly of opinion ⁷⁷² that plaintiff is not entitled to maintain an action which, if successful, would result in a personal judgment against the defendant of no more binding force than the one he already has."

Our practice appears to be not altogether similar to that in Iowa. Here the garnishee personally appears and answers what he owes the defendant: Civ. Code. Prac., sec. 24. He is not made a party to the suit at all (except as stated below) if he makes such answer: *Wilder v. Shea*, 13 Bush, 128; *Smith v. Gower*, 3 Met. 171. A personal judgment cannot be rendered against a garnishee upon the mere assertion of liability to the defendant debtor: *Bowen v. Emerson*, 4 Bush, 345; *Griswold v. Popham*, 1 Duvall, 170; *Joyce v. O'Toole*, 6 Bush, 31. Should the garnishee fail to answer, or fail to make true and satisfactory answer, he may then be made a party defendant; a cause of action being stated against him by the plaintiff on behalf of the debtor defendant: Civ. Code Prac.,

sec. 229, and cases just cited. If the garnishee does answer, and it is satisfactory to the plaintiff, the court may order the sum owing to be paid into court, or may hear proof, and from it determine the sum owing and order it so paid in, or fix the terms on which it may be held: Civ. Code Prac., sec. 225; *Cavanaugh v. Fried*, 3 Ky. Law Rep. 253; *Smith v. Gower*, 3 Met. 171. Or, in an action in equity brought pursuant to section 439 of the Civil Code of Practice, on a return of nulla bona, for discovery of assets, debtors of the principal debtor may be made defendants, a cause of action in the latter's behalf against them being stated in the petition.

In the case at bar, a cause of action in favor of defendant Herndon against the estate of M. W. Johnson ⁷⁷³ was stated. No presumption of satisfaction should be indulged in this case from the mere identity of the debtor and personal representative's being the same; for there was not only no right in the personal representative to do so, but it is admitted by the demurrer that it had not been done by an actual appropriation or otherwise. Our conclusion is sustained by the supreme court of Alabama in *Dudley v. Falkner*, 49 Ala. 148. Funds of an estate in the hands of an administrator are not funds in court, although there is a suit pending in the court to settle the estate. The service of the attachment upon the clerk, as permitted in attaching a fund in court, did not, therefore, create any lien in this case.

But for the reasons indicated the judgment is reversed and cause remanded, with directions to overrule the demurrer to the petition and for proceedings consistent herewith.

An Administrator is not Subject to Garnishment in respect to funds in his hands belonging to an heir or legatee, in advance of the decree of distribution: *Orlopp v. Schueller*, 72 Ohio St. 41, 106 Am. St. Rep. 853, and see the cases cited in the cross-reference note thereto.

WESTERN UNION TELEGRAPH COMPANY v. LACER.

[122 Ky. 839, 93 S. W. 34.]

TELEGRAPH COMPANY—Liability for Mental Suffering.—

Where the delivery of a telegram conveying information of the expected death of a brother of the addressee is negligently delayed until after the death occurs, the telegraph company is liable in damages for the mental suffering its negligence occasions the addressee. (p. 503.)

TELEGRAPH COMPANY—Conflict of Laws.—

Where a telegram is sent from a town in Indiana to a city in Kentucky, and in course of the transmission in Indiana the name of the addressee is altered so that the delivery of the message in Kentucky is delayed, the breach of contract occurs in Kentucky, and the action by the addressee for damages is governed by the law of that state. (p. 505.)

Richards & Roland, for the appellant.

Chesley & Searcy, for the appellee.

⁸⁴⁰ O'REAR, J. A telegram was sent from Booneville, Indiana, to appellee, then at Louisville, Kentucky, on August 19, 1904, as follows: "Jake Lacer, Enterprise Hotel, Louisville, Ky. Napoleon failing, can't live, doctor says. L. Lacer." The Napoleon referred to was appellee's brother. He was then very ill at Booneville, Indiana, and died on August 21, 1904. If the telegram had been delivered promptly, appellee, who was at the Enterprise Hotel in Louisville, could have reached his brother's bedside before his death. But the telegram was not delivered till August 25, 1904, six days after it was sent, and four days after the death of appellee's brother referred to therein. It is admitted that appellant had not a direct line of wire from Booneville, Indiana, to Louisville, Kentucky. The message had to be sent to Evansville, Indiana, where it was transferred from one of appellant's lines to another, and thence forwarded to Louisville. In taking it off the Booneville line and transferring to the Louisville line some of appellant's agents misread the name Lacer, and sent it as Koer, so that, when it was delivered to the Enterprise Hotel at Louisville, there being no one there by the name of Jake Koer, it was returned to appellant's receiving office ⁸⁴¹ in Louisville, where it was found by appellee at the date last mentioned above. Appellee brought this suit in the Jefferson circuit court to recover damages for his mental suffering occasioned by appellant's

breach of its contract in failing to deliver the message expeditiously, as it had agreed to do.

The action is maintainable under the laws of this state (Chapman v. Western Union Tel. Co., 90 Ky. 265, 12 Ky. Law Rep. 265, 13 S. W. 880; Western Union Tel. Co. v. Van Cleave, 107 Ky. 464, 22 Ky. Law Rep. 53, 92 Am. St. Rep. 366, 54 S. W. 827, unless, as appellant contends it is, the cause of action accrued in Indiana, where such damages are not recoverable, which brings us to an analysis of the cause of action sued on. Appellant is engaged in a service of the public for hire. Its business is that of a common carrier of messages. It contracted with the sender of the dispatch in this case, for the benefit of appellee, that it would promptly and expeditiously deliver the exact message received by it to the person at the place addressed. The relation is one growing out of contract. The breach by appellant gives the sendee of this message the right to recover damages within the legal contemplation of the parties when it was entered into, which, since the Chapman case, *supra*, must be deemed to have included mental anguish occasioned by a failure to deliver it. Appellant seeks to avoid the breach of the contract by alleging, so as to avoid the effect of the Kentucky rule on this subject, that the breach occurred by reason of its negligence wholly in the state of Indiana, where the contract was made. The cases of Cleveland, C., C. & St. L. Ry. Co. v. Druien, 118 Ky. 237, 26 Ky. Law Rep. 103, 80 S. W. 778, 66 ⁸⁴² L. R. A. 275, and Adams Express Co. v. Walker, 119 Ky. 121, 26 Ky. Law Rep. 1025, 83 S. W. 106, 67 L. R. A. 412, are particularly relied on as supporting its position in this contention. Each of these cases arose out of a contract to ship property from another state into the state of Kentucky by a common carrier operating in both the states. In each case it was held that the breach of such a contract made in another state would give to the shipper or consignee a right of action therefor in the state where the breach occurred, which would be governed by the laws of such latter state. From this it is argued that, as it is admitted that the negligent act of appellant in this case, by which the dispatch was altered in the name of the addressee and sender, occurred wholly in Indiana, the cause of action therefor arose then in that state, and the rights of the parties growing out of the contract must be controlled by the laws of that state. This contention is, we think, a misconception of the nature of the action in this case. It is

for the breach of a contract, caused, it is true, by a tortious act of appellant. A contract made in one state, to be performed partly where made and partly in another state, should be construed, in fixing a liability for its breach, according to the laws of the jurisdiction where the breach occurred; for it must be conclusively presumed that the parties entered into it with such intent, purposing that in its execution, as well as in its construction, the laws of each state where it was being performed were to be read into it. This is the precise point decided in the Druen case (118 Ky. 237, 26 Ky. Law Rep. 103, 80 S. W. 778, 66 L. R. A. 275).

But, argues appellant, the performance in this case was in course of execution in Indiana, where the contract was made, when it was breached; i. e., when ⁸⁴² appellant negligently altered the address so as to cause it to miscarry. The thing contracted for in this case was, not to carry property, but to do a service. The service which was contracted for was to expeditiously deliver the correct message to the addressee at the point addressed: See extended opinion in *Howard v. Western Union Tel. Co.*, 119 Ky. 625, 27 Ky. Law Rep. 858, 84 S. W. 764, 86 S. W. 982. Transcribing it into the characters of the Morse code, or otherwise, temporarily rendering it unintelligible to ordinary persons including appellee, would not affect the contract or any rights of the parties, so long as it was finally and in due time correctly communicated to the person intended. The message consisted of intelligence to be transmitted partly by means of electrically conducted sounds and partly by messenger, so that it would quickly reach the person designated by the contract. Appellant undertook to do this. It was a single undertaking, the performance of which was to take place in Kentucky. The delivery of the message, the communication of the intelligence to the person named, was the thing to be done. The contract in suit is not different in this feature of its nature than if A undertook to go in person from Booneville, Indiana, to Louisville, Kentucky, and there find B at a named point, and communicate to him a message for the sender. Whether A en route forgot the message, or misremembered the name of the person to whom it was to be delivered, would not be material as affecting his liability in the undertaking. If he in fact found the person and told him the true message, the contract would be satisfied. But his failure to deliver would be a breach of his undertaking, which could not occur till he failed

to deliver at the place ⁸⁴⁴ and within the time contracted for. That appellant, a corporation, sends its messages by electric current, instead of personal messengers, does not alter the nature of the service, so far as its being an undertaking to do a single thing. The element of expedition is the principal material difference between the service undertaken in this case and the one imagined in the illustration. In our opinion it is materially different from the nature of a contract to carry a chattel and deliver it. As was said in the *Druen* case (118 Ky. 237, 26 Ky. Law Rep. 103, 80 S. W. 778, 66 L. R. A. 275), that contract (to carry a lot of horses) "was not only to deliver. It was also to safely carry. It was broken when the horses were killed. A cause of action upon the contract instantly arose. A suit could have been maintained there that moment for its breach." Obviously, if a carrier undertook to carry a lot of horses from a point in Illinois and deliver them to a point in Kentucky, if the horses were killed by the carrier in Illinois, it could never do anything more toward executing its undertaking. The thing it was to carry and deliver no longer had an existence. The chattel consigned to the carrier's safekeeping had been destroyed by it. Hence the consignee could then say that the undertaking was that moment broken. But in the case at bar the thing to be transmitted was formless, impalpable, a message of words conveying intelligence, a mental picture of a fact, to be reproduced by words uttered. It could not be hurt, much less destroyed, in its transmission. Nothing but the failure to deliver in due time could affect its value to the sendee. There cannot be a segregation of liability on the undertaking. It is whole, single, and susceptible of becoming fixed only in the final act contemplated. A telegraphic message is not property ⁸⁴⁵ which can be destroyed, though undoubtedly it is susceptible of such interest akin to a property right, that the sender and sendee would be entitled to be protected in its privacy. We are of opinion that appellant's liability on the contract in suit is to be measured by the laws of this state, where the breach of contract occurred. Such was the ruling of the circuit court.

Judgment affirmed.

Damages Against Telegraph Companies for mental suffering occasioned by their negligent delay in transmitting or delivering messages are, according to the better rule, recoverable: *Shepard v. Western Union Tel. Co.*, 143 N. C. 244, 118 Am. St. Rep. 796; note to

Kagy v. Western Union Tel. Co., 117 Am. Rep. 301. In some states, however, a contrary doctrine prevails, and therefore the question often arises as to what law governs in the case of an interstate telegram. For recent authorities on this point, see **Johnson v. Western Union Tel. Co.**, 144 N. C. 410, 119 Am. St. Rep. 961; **Western Union Tel. Co. v. Waller**, 96 Tex. 589, 97 Am. St. Rep. 936; **Gray v. Telegraph Co.**, 108 Tenn. 39, 91 Am. St. Rep. 706, and note.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. WIMBY.

[119 La. 139, 43 South. 984.]

JURORS—Qualifications—Residence.—Mere temporary absence of a person from the parish of his residence, without intention of changing citizenship or abandoning his residence, will not destroy his qualifications to serve as a juror in such parish. (p. 509.)

CRIMINAL Law—Misconduct of Bystander.—Manifestations of grief or sympathetic expressions in court, by spectators related to the accused or the deceased in a criminal trial do not furnish good ground for a mistrial and the discharge of the jury, especially when the offending person is rebuked and the jury instructed to disregard the incident, and not to permit it to influence them in any manner. (p. 510.)

W. Overton and Plauché & Wall, for the appellant.

W. Guion, attorney general, L. Guion and L. H. Moss, for the state.

¹³⁹ LAND, J. The defendant was indicted for murder, tried and found guilty without capital punishment. She appeals from a sentence of imprisonment for life in the penitentiary.

Defendant relies for reversal of the verdict and sentence on two bills of exception.

1. Defendant moved to quash the indictment on the ground that Hawkins Carrol, one of the grand jury that found the indictment, was incompetent to serve as a grand juror, because he had not been a bona fide resident of the parish of Calcasieu for one year next preceding his said service as required by Act 135 of 1898, page 216, section 1.

Hawkins Carrol was born and reared in ¹⁴⁰ the parish of Calcasieu. He was there married and had his fixed abode.

He was a teacher in the public high school for several years. In September, 1905, he accepted the position of professor of geology and biology in the State Industrial Institute of Ruston, Louisiana, and there remained with his wife and children until May, 1906, when he returned to Calcasieu parish. He went to Ruston to teach in the Industrial School for a season, but with no intention of there establishing a permanent residence. He paid his poll taxes in the parish of Calcasieu, and since his return has voted at two elections held therein. He has never had any intention to abandon his permanent and bona fide residence in the parish of Calcasieu. He had been in said parish about eight months just preceding his service as a grand juror.

Section 1 of Act 135 of 1898 provides that the qualifications of a juror to serve in any of the courts of this state shall be as follows: "To be a citizen of the United States and of this state, a bona fide male resident of the parish in and for which the court is holden for one year next preceding such service," etc.

These requirements were copied literally from section 1 of Act No. 54, page 52, of 1880.

In *State v. Alexander*, 35 La. Ann. 1100, decided in 1883, this court held that: "Mere temporary absence from the state, during the year prior to the service of a juror, if without the intention of changing citizenship or abandoning residence, will not destroy the qualifications of the juror."

In that case the statement of facts is as follows: "It appears that the grand juror objected to had for more than a year sojourned in the state of Texas upon business of a temporary nature, but, as he declares, with no intention of changing his citizenship or abandoning his residence in Bienville parish. Upon concluding the business, he returned to his home, where he had been for about eight months prior to his summons as a grand juror."

The court declared that such temporary absence, under the circumstances and with ¹⁴¹ the intention disclosed, had no effect upon the juror's citizenship, domicile, or upon his residence, in the sense in which that term is used in Act No. 54, page 52 of 1880.

"It is said that there is no technical definition as to what constitutes a 'residence,' but it is chiefly a question of intent": 24 Cyc. 200. The term "residence" implies permanency or for an indefinite period: 24 Cyc., note 12.

In defining the political rights of the citizen the term "bona fide resident" is used in our state constitutions. The same term is used in the acts prescribing the qualification of jurors. There is little or no distinction between the "residence" of the voter or juror and his "domicile." If the juror or voter has as a matter of fact lived in different parishes or precincts, his true residence must be determined by his intention as in other cases. Where there is any doubt, the place of registration or payment of poll tax is conclusive as indicating the true intent. In the case at bar both of these indices are present. We concur in the conclusion of the district judge that it was never the intention of the lawmaker to require the actual physical presence of the juror in the parish during every month of the year immediately preceding his service.

2. During the progress of the trial, upon the production before the jury of blood-stained garments purporting to have belonged to the deceased, a lady, dressed in black, sitting among the spectators, made an outcry, in the nature of a moan, and started to leave the courtroom. On reaching the door, she cried in an audible voice, "Poor Will!" Whereupon counsel for the defendant moved the court to enter a mistrial and to discharge the jury. The motion was overruled by the court. It appears from the per curiam that the lady was a stranger to the judge and probably to the jury, and that the information that she was the mother of the accused was brought out by the action of the counsel for the defendant. The judge directed ¹⁴² the sheriff to see that the lady did not re-enter the courtroom during the progress of the trial, and instructed the jury to disregard the incident and not to permit it to influence them in any manner.

It is evident that neither the court nor the prosecution was responsible for the unfortunate occurrence. The judge says that the evidence fully sustained the verdict returned by the jury, and that the accused did not suffer any injury from the action of the lady. It appears from the record that the defendant admitted the killing and relied on the plea of self-defense.

In *State v. Renaud*, 50 La. Ann. 662, 23 South. 894, the father of the deceased was sitting in the audience. The district attorney in the course of his address to the jury remarked: "What will you do with the accused?" The father exclaimed: "Put a rope around his neck." The judge at once took the necessary steps to prevent the repetition of any

such remarks in the court. The verdict was guilty of murder as charged, and the accused was sentenced to be hanged. The court refused to set aside the verdict, holding that the incident could not be viewed as having unduly influenced the verdict.

In *State v. Robinson*, 52 La. Ann. 551, 27 South. 129, a brother of the deceased interrupted and contradicted the accused while testifying in his own behalf. The judge imprisoned the disturber for contempt. This court declined to interfere, saying that the opinion of a district judge that the incident did not affect the verdict was a finding on a matter which he was peculiarly competent to determine.

In *State v. Spillers*, 105 La. 163, 29 South. 480, a murder case, the district attorney in closing his address appealed to the jury to bring in a verdict of guilty, whereupon the ¹⁴³ crowd in the courtroom burst into applause, which the judge immediately suppressed, and sent the sheriff in the audience to apprehend the wrongdoers, at the same time instructing the jury to disregard the applause, and to be governed by their opinion alone. The defendant was found guilty as charged, and was sentenced to death. This court refused to interfere, it not being evident that the jury was influenced by the incident.

It is a general rule that "remarks of bystanders unfavorable to the accused, to or in the presence of the jury, and overheard by them, although reprehensible, are not ground for a new trial, unless it shall actually appear that a verdict of conviction was produced thereby": 12 Cyc. 730.

A fortiori, the same rule applies to remarks made in open court, where the judge has the opportunity to counteract their possible prejudicial effects on the jury by rebuking the disturber and instructing the jury to disregard them.

In the case at bar the emotion displayed by a mother at the sight of the bloody garments once worn by her son was involuntary, and can hardly be called misconduct in the ordinary sense of the term. Manifestations of grief by spectators related to the accused or the deceased have never been considered as furnishing good ground for the discharge of juries.

We see no errors in the proceedings, and it is therefore ordered that the judgment appealed from be affirmed.

IMPROPER DEMONSTRATIONS OR REMARKS BY SPECTATORS AS GROUND FOR MISTRIAL OR NEW TRIAL

- I. Applause, Laughter or Hisses, 511.**
- II. Improper Remarks, 514.**
- III. Display of Emotion, 515.**

I. Applause, Laughter or Hisses.

The misconduct of a spectator or bystander in open court, during the progress of a criminal trial, in applauding the remarks or argument of the prosecuting attorney, or the statements of witnesses for the prosecution, furnishes no ground for a new trial, or for a reversal of the judgment, where the trial judge has taken the proper steps to immediately suppress such applause and to prevent a repetition thereof, by rebuking or punishing the persons making the demonstration, and it does not appear that the jury were influenced thereby to the prejudice of the accused: *Arnold v. Commonwealth*, 21 Ky. Law Rep. 1566, 55 S. W. 894; *Green v. Commonwealth*, 26 Ky. Law Rep. 1221, 83 S. W. 638; *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724; *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045; *Debney v. State*, 45 Neb. 856, 64 N. W. 446, 34 L. R. A. 851; *State v. Larkin*, 11 Nev. 314; *State v. Brown*, 28 Or. 147, 41 Pac. 1042; *Weathersby v. State*, 29 Tex. App. 278, 15 S. W. 823; *Parker v. State*, 33 Tex. Cr. Rep. 111, 21 S. W. 604, 25 S. W. 967; *Doyle v. Commonwealth*, 100 Va. 808, 40 S. E. 925; *Bowles v. Commonwealth*, 103 Va. 816, 48 S. E. 527. There can be no reversal because of improper applause of certain statements of the prosecuting attorney in argument, where the trial court suspended such argument, caused the sheriff to make search for the persons guilty of the demonstration, and threatened punishment in case of its repetition; there being no request to set aside the swearing of the jury and to impanel a new one: *Arnold v. Commonwealth*, 21 Ky. Law Rep. 1566, 55 S. W. 894. If, at the close of the argument of the prosecuting attorney in a criminal case, some of the spectators showed their approval by stamping, and the court thereupon ordered the sheriff to arrest every person guilty of such conduct, and, upon the sheriff reporting that he was unable to locate the guilty persons, the court at once sternly rebuked such conduct, the facts do not show any dereliction of duty on the part of the court or of the sheriff, and are not ground for reversal, especially when no previous disorder had occurred: *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045. In *Debney v. State*, 45 Neb. 856, 64 N. W. 446, 34 L. R. A. 851, it appeared that when the prosecuting attorney furnished his closing address to the jury some of the bystanders, without the knowledge or connivance of anyone connected with the prosecution, applauded, which was quickly suppressed by the trial judge, who administered a rebuke to the persons applauding, and it was decided that the record failed to disclose that the accused was prejudiced by the demonstration. If, on a murder trial, the audience applauds the remarks of the

prosecuting attorney in closing his argument, the fact that the jury were not in the charge warned against being influenced by such applause is not ground for reversal, when it appears that the court promptly checked the applause and that the defendant requested no warning: *State v. Brown*, 28 Or. 147, 41 Pac. 1042. In *Cartwright v. State*, 16 Tex. App. 473, 49 Am. Rep. 826, in a murder trial, at the end of the opening address of the prosecuting attorney, the audience applauded, and the prosecuting attorney in his closing address alluded to, and approved this, and the court did not check or reprimand the audience or the counsel, nor caution the jury, such conduct was claimed to be prejudicial and reversible error. The court on appeal refused to pass upon the question, but said that "It is unnecessary for us to determine whether or not we would suffer this conviction to stand if this bill of exception presented the only ground for reversal. It is enough for us to say now that we think the court should have taken prompt and decisive action on the occasion, and should have endeavored by its condemnation of the proceeding, and its admonitions to the jury to prevent any prejudice to the defendant by such reprehensible conduct, and in this effort on the part of the court counsel for the state should have united." If the trial court promptly rebukes applause called forth in a criminal case by a witness for the state, and by remarks of the prosecuting attorney, and threatens to clear the courtroom, and places officers in the rear of the room to prevent a recurrence of such demonstrations, a judgment of conviction will not be reversed by reason thereof: *Doyle v. Commonwealth*, 100 Va. 808, 40 S. E. 925. If applause which is not hostile to the accused is made on a trial for murder, at certain humorous statements made by the prosecuting attorney in argument to the jury, but is instantly stopped by the court and its officers, it is not prejudicial to the accused, though highly improper: *Green v. Commonwealth*, 26 Ky. Law Rep. 1221, 83 S. W. 638. And when applause is made by a few in the audience on the return and after the reading of the verdict, but is instantly stopped by the court, it is not prejudicial to the accused even though of a hostile character: *Green v. Commonwealth*, 26 Ky. Law Rep. 1221, 83 S. W. 638.

If, during argument of counsel for the state in a criminal case, some of the spectators make demonstrations of approval, which are not distinctly heard by the presiding judge, and of which he did not know the import, and his attention was not called thereto by counsel or otherwise until after the jury had retired, his failure to reprimand the disorderly persons, or to take any official action touching the matter, is no cause for a new trial: *Burns v. State*, 89 Ga. 529, 15 S. E. 748.

Applause by a number of those present at a criminal trial, at once checked by the presiding judge, and especially when he particularly directs the jury not to give it any attention, and decide the case according to their judgment, offers no ground to set aside the verdict: *State v. Spillers*, 105 La. 163, 29 South. 480.

In *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461, it appeared that during the closing argument in a criminal case the state's attorney was applauded, and the court ordered an officer to arrest the offending parties, and the attorney speaking denounced the applause as infamous, and the court also instructed the jury that they were not to allow prejudice to influence them, but were to arrive at their verdict solely by a consideration of the testimony before them, and it was decided on appeal that everything possible had been done by court and counsel to neutralize the effects of the remarks and applause of the bystanders, and that, under the circumstances, the demonstrations were not ground for reversal.

However, if during the argument of a prosecuting attorney to the jury his remarks are applauded by persons in the audience, it is the duty of the trial court to grant the defendant a new trial, if it appears clearly probable that the jury were influenced against him by such action: *Hamilton v. State*, 36 Tex. Cr. Rep. 372, 37 S. W. 431. In this case the court said: "It is also urged that the bystanders applauded the argument of the district attorney, and that they were not fined or reprimanded by the court. The court explains that when the applause occurred, he commanded silence, which was obeyed, and he ordered the sheriff to arrest any persons so offending and to prevent a repetition; that such applause was principally in the gallery of the courtroom, and could not for the moment be controlled by the court or the sheriff, nor could it be ascertained afterward who the offending parties were. Such conduct in the trial of a case is certainly very reprehensible, and is calculated to greatly prejudice the rights of a defendant on trial with the jury, and when such conduct occurs, it should be the duty of the court to use every means in his power to ascertain the guilty parties, and to visit upon them the severest punishment that the law authorizes, and even then, it is doubtful whether such action will withdraw from the jury the effect that may be produced upon them by the plaudits of a mob approving the sentiments announced by the prosecution. When such conduct does occur the judge should scan the record very carefully, and, if it is probable that the jury were influenced thereby, a new trial should be granted." If a criminal trial is conducted in the midst of an excited crowd which exhibit their feelings on severe strictures on defendant and his witnesses by counsel for the state by loud applause, and such conduct is repeated several times without hindrance by the court, until defendant's counsel takes an exception and afterward the crowd indulges in boisterous applause at the close of the argument by the state's counsel, such conduct on the part of the court and of the crowd is prejudicial to the defendant, and he is entitled to a new trial: *Manning v. State*, 37 Tex. Cr. Rep. 180, 39 S. W. 118. If in a murder trial while defendant's counsel is addressing the jury a large number of the spectators, simultaneously, and as if by agreement leave the courtroom, and soon thereafter a fire alarm is sounded nearby which causes a number of other persons to leave, and the trial

judge in his statement of the case finds that such demonstrations were for the purpose of breaking the force of the argument, but does not find that the jury were influenced thereby, the action of the trial judge is error, as the defendant is entitled to a new trial under such circumstances: *State v. Wilcox*, 131 N. C. 707, 42 S. E. 536.

Misconduct of the attendants on a trial for homicide consisting of demonstrations by hissing and other indications of disapproval of the objections and argument of defendant's counsel are not ground for a new trial, if such demonstration does not indicate that the jury were in any way subjected to popular pressure, or undue influence: *State v. Thomas* (Iowa), 109 N. W. 900.

In a prosecution for homicide the fact that a ripple of laughter went through the audience at the time of the discomfiture of defendant's counsel by a witness, while reprehensible and calling for a reprimand from the trial court, does not require a reversal of the conviction: *Lax v. State*, 46 Tex. Cr. Rep. 628, 79 S. W. 578.

II. Improper Remarks.

Improper remarks made by attendants upon a criminal trial in the presence of the court and jury are not generally ground for a new trial, especially when the offender is at once rebuked and punished, or removed from the courtroom. It is only in cases where such conduct is clearly prejudicial to the defendant that a new trial may be granted for such cause: *Stevens v. State*, 93 Ga. 307, 20 S. E. 331; *State v. Renaud*, 50 La. Ann. 662, 23 South. 894; *State v. Robinson*, 52 La. Ann. 541, 27 South. 129; *Brake v. State*, 4 Baxt. 361; *Turner v. State*, 89 Tenn. 547, 15 S. W. 838. Thus after a grossly improper remark by a bystander has been made on the arraignment of a prisoner, and in the hearing of persons summoned as jurors, and defendant allows the case to proceed without objection, without moving to postpone the trial, or in any way invoking the ruling of the court, such improper remark does not furnish cause for a new trial; especially where the presiding judge promptly rebukes the offender, and has him removed from the courtroom. Nor do improper remarks made by another bystander, but not heard by the court, no attention being called thereto until after the trial, require that a new trial should be granted: *Stevens v. State*, 93 Ga. 307, 20 S. E. 331. And a single declaration uttered during the progress of the trial by the father of the deceased, apparently hostile to the accused, which is at once repressed by the trial court, cannot be viewed as having unduly influenced the verdict of the jury against the accused: *State v. Renaud*, 50 La. Ann. 662, 23 South. 894. Or an interruption by a brother of the deceased, of the testimony being given by the accused, by an exclamation denying the truth of a fact stated by the witness, does not justify a reversal of the verdict, when the disturber was called to the bar, rebuked and punished, and the jury instructed to disregard the remark, it not appearing that they were influenced thereby: *State v. Robinson*, 52 La. Ann. 541, 27 South. 129. The verdict of a jury is not so tainted as to entitle the defendant to a new trial, because bystanders, after

the conclusion of the testimony, remark in language audible to both court and jury that the defendant ought to undergo certain degrees of punishment and ought to hang, it not appearing that such remarks were encouraged and approved by the jury, or that they influenced their verdict: *Brake v. State*, 4 Baxt. 361. In this case the court said: "That such remarks could have been made in the hearing of the court without stern rebuke and instant punishment we cannot believe. And it would be a precedent of very questionable propriety to hold that remarks made in open court, in its presence, and in the presence of the jury for which they are in no wise responsible, shall be imputed to them as misconduct which vitiates their verdict."

A remark made to one of the jurors "that he looked warm" is a matter of no moment, when the jury has not been permitted to separate and are being accompanied by two deputy sheriffs to the jury-room: *State v. Goodson*, 116 La. 388, 40 South. 771.

If during the argument of state's counsel in a capital case spectators make remarks of approval which are not heard by the presiding judge, and of which he did not know the import, his attention not having been called to them by counsel or otherwise until after the jury had retired, his failure to reprimand the disorderly persons, or to take any official action in the matter, is no cause for a new trial: *Burns v. State*, 89 Ga. 527, 15 S. E. 748.

It is not ground for a new trial that before the jury was impaneled, but in their presence, a bystander remarked in open court that the defendant's wife said she would not come, because she would only help to keep her husband in jail. Nor would it have been ground for a new trial, if it had occurred during the trial, since the remark was not admitted in evidence, and since the presumption is that jurors are of sufficient intelligence to know that their verdicts must be based solely on evidence adduced at the trial, and the law as laid down by the court: *State v. Jackson*, 112 N. C. 851, 17 S. E. 149. An improper remark imputed by a bystander to a juror as having been made by him to his fellow-jurors while serving on the trial of a previous case is not cause either for declaring a mistrial, or for granting a new trial: *McTyier v. State*, 91 Ga. 254, 18 S. E. 140.

If, in a murder trial, a juror inquires of a bystander, who has not been sworn, if the statements of a certain witness are true, and he replies that they are, and such statement is not stricken out, it is such error as requires a new trial: *Dempsey v. State*, 47 Ill. 323.

III. Display of Emotions.

As was decided in the principal case, manifestations of grief by spectators related to the accused or the deceased, or by others, have never been considered, so far as we are able to find, as furnishing ground for the discharge of the jury, or after conviction, for a new trial. Thus, in a prosecution for homicide and after conviction, the accused cannot complain, as ground for a new trial, of the weeping of the deceased's widow while she was in court during the argument

of the case: *State v. Barrington*, 198 Mo. 23, 95 S. W. 235. And in a prosecution for homicide, it is not error for the court to permit the decedent's widow to sob in the courtroom during the taking of testimony, and while weeping, to make an unanticipated outbreak denouncing the defendant, if she was quickly required thereafter to withdraw from the courtroom: *Stevens v. Commonwealth*, 30 Ky. Law Rep. 290, 98 S. W. 284. In a murder trial the fact that the decedent's mother shed tears, sobbed, etc., while testifying is not ground for the reversal of a conviction when the court could not control her conduct: *Vaughn v. State* (Tex. Cr. Rep.), 101 S. W. 445.

The mere fact that while the statement was being made for the accused in a criminal case a woman in the gallery in the back part of the courtroom burst out sobbing and crying loudly, but was immediately removed by order of court, and that the court thereupon refused to declare a mistrial, is no ground for a reversal of the verdict of conviction and the judgment and the awarding of a new trial, it not appearing who the woman was, or how the defendant was injured by the occurrence: *Clements v. State*, 128 Ga. 547, 51 S. E. 595.

IN RE SCHWARTZ.

[119 La. 290, 44 South. 20.]

CONSTITUTIONAL LAW—Title of Statute—Preservation of Nongame Birds.—The title of an act entitled "For the protection of birds other than game birds and their nests, eggs, and to provide a penalty," sufficiently states the object of the statute, and is broad enough to cover a provision that no person within the state shall kill, catch, or have in his possession, living or dead, any resident or migratory wild bird other than a game bird, or purchase, offer, or expose for sale any such bird after it has been killed or caught, and that no part of the plumage, skin or body of any bird protected by the statute shall be sold or had in possession for sale, and this irrespective of whether such bird was captured or killed within or without the state. (p. 519.)

CONSTITUTIONAL LAW—Title of Statute—Preservation of Nongame Birds.—If the title to a statute reads that it is "for the protection of birds other than game birds, and to provide a penalty," and the statute makes it a crime for anyone within the state to kill, catch or have in his possession, living or dead, any resident or migratory wild bird other than a game bird, or to purchase, offer, or expose for sale any such wild nongame bird, or any part thereof, after it has been killed or caught, such title of the act is notice to those who deal in feathers that the commerce that is death to nongame birds must cease, and such statute is not directed against any particular industry. (p. 519.)

INTERSTATE COMMERCE—Police Power—Preservation of Nongame Birds.—In the exercise of its police power the state may make it an offense to have nongame birds in possession for transporta-

tion beyond the state, and a statute creating this as an offense does not violate the interstate law relating to commerce. (p. 520.)

CONSTITUTIONAL LAW—Protection of Nongame Birds.—A statute which prevents the useless destruction of nongame birds and prohibits their sale under a penalty is not unconstitutional either as a restraint of liberty of trade, or as authorizing seizures without due process of law. (p. 521.)

The statute involved in the principal case reads as follows: "Title: For the protection of birds other than game birds, and their nests, eggs, and to provide a penalty."

"Sec. 3. Be it further enacted, etc., that no person, within the state of Louisiana, shall kill, catch, or have in his or their possession, living or dead, any resident or migratory wild bird other than a game bird, or purchase, offer or expose for sale any such wild nongame bird after it has been killed or caught, except as permitted by this act. .

"Sec. 4. Be it further enacted, etc., that no part of the plumage, skin, or body of any bird protected by this act shall be sold or had in possession for sale, and this irrespective of whether said bird was captured or killed within or without the state": Act No. 48, p. 106, Laws of Louisiana 1904.

C. Rosen and McCloskey & Benedict, for the relator.

J. P. Parker, district attorney, and W. W. Westerfield, assistant district attorney, for the state.

Stafford, Lambert & Robinson, for the respondent, Audubon Society of Louisiana.

²⁰¹ BREAU, C. J. The defendant, owner of a large store on Canal street, in New Orleans, prosecuted for violating Act No. 48, page 106, of 1904, by offering for sale seventy-five feathers of the aigrette, found guilty by the first city criminal court, and sentenced to pay a fine of fifty dollars or imprisonment, appealed to the criminal district court.

After hearing before the criminal district court on appeal, that court affirmed the judgment, except with a slight modification of the penalty.

On application to this court for certiorari and prohibition to be addressed to the criminal district court, a writ nisi issued in accordance with relator's petition.

The return made in answer to the writ showed that the game warden of the parish of Orleans, in November, 1905, charged defendant by affidavit before the judge of the first

city criminal court with having violated the act, cited *supra*, in having "in his possession and by offering for sale colored plumes, part of the body of the aigrette."

There was a trial on this affidavit before the court of the first instance, and on appeal before the criminal district court it resulted as before mentioned.

We take up the different points in the order that they are presented to us for decision by defendant.

292 OBJECT NOT EXPRESSED IN TITLE.

The first objection of defendant is that the title of the act, cited *supra*, under which the prosecution was instituted, fails to set forth the object of the statute. The argument in support of the above proposition is that it is an attempt to regulate a business which is not within the police power, and that the title of the act gives no intimation of the purpose of the statute in that respect.

In order to determine whether or not the title sufficiently indicates the object, it serves a purpose to dwell for a moment upon the object the legislature had in view in adopting the statute. It was to prevent the destruction of the heron. One of the species of this bird is classed by active ornithologists as the Louisiana heron, and by that name it is known everywhere and admired for its beauty.

The aigrette is another of the different species of herons. Its attachment for particular places during seasons is well known. It is a migrant four or five months of the year. It leaves the shores of the Gulf of Mexico early in the winter, and goes farther south, where the temperature is milder, and perhaps attracted by the promise of food of which it is very fond. It returns early in the spring, and remains until the following winter.

The aigrette is elegant. Many feel for it, and think it should be permitted to live the allotted time; that it is cruel to shoot them down in great numbers, as is sometimes done. The cluster of plumes on its head and shoulders is also known by the name of "aigrette." The bird is aigrette, and the cluster of plumes also is known by that name. These plumes are worn by ladies as part of their head-dress. They sometimes decorate the helmet of the soldier. To procure one of these clusters of feathers it is sometimes necessary to kill as many as twenty birds, ²⁹³ and even over that number. They breed on the Gulf coast, and were fast disappearing.

It is not difficult to kill them in breeding time. It must have occurred to the legislature that something should be done for their protection. The title, bearing in mind the object in view, clearly indicates the object. The aigrette cannot be procured without killing the bird. The title shows the object. The title is as complete as it was in *State v. Ackerman*, 51 La. Ann. 1209, 26 South. 84, and in *Morgan's La. etc. R. R. Co. v. Barton*, 51 La. Ann. 1338, 26 South. 271, in which the court held that jurisprudence does not favor the annulling of acts on the ground that every detail of a law is not expressly indicated by the title. It is sufficient if it denotes the object, and if the title affords a complete clue to the law: *Succession of Lanzetti*, 9 La. Ann. 329.

Continuing with the subject of the insufficiency of the title, the learned counsel argue that the text goes further than the object indicated by the title; that the statute interferes uselessly with an important branch of the millinery business, without an intimation of that object in the title; that it is against public policy.

Taking up, in passing, the last portion of the propositions first for decision, we have to state that the inutility or impolicy of the statute presents no question upon which we feel authorized to act. The legislature must have deemed that it would serve a useful object, and that there was good policy in preventing the destruction of nongame birds. They are deemed useful. They destroy insects and reptiles, and thereby assist in preparing the ground for human habitation. To stimulate a love for them must have been one of the purposes. It is often thought that their protection has a humanizing and elevating influence. The title was not only an intimation, but a notice, to those who deal in feathers, that the commerce that was death to nongame birds must cease.

²⁹⁴ The decisions cited by learned counsel for defendant have no pertinence, viz.: *State v. Ferguson*, 104 La. 249, 81 Am. St. Rep. 123, 28 South. 917; *State v. Walker*, 105 La. 492, 29 South. 973.

The acts attacked by defendants in said cases were an interference with trade and against the freedom of commerce, which the laws seek to guard against. In our case (different from the just cited case), in our opinion, it is not an interference with trade or against the freedom of commerce. Here the object was to protect living things under the police

power—a distinct object clearly within that power, which the word “protection” in the title embraces.

The statute is not directed against any particular industry.

The sections of the act interpreted are shown in the statement of facts at page 517.

INTERSTATE LAW REGARDING COMMERCE.

The interstate commerce clause, as interpreted by defendant, affords him scant support in his defense.

That law has not been violated by adopting the statute in question. In the first place, the feathers were offered for sale at defendant's store. They were not in original packages. The interstate law is a protection to merchandise falling within its text, while it is an unbroken package. Moreover, in the exercise of its police power, the state may make it an offense to have birds in possession for transportation beyond the state if needful for their protection. The statute creating this as an offense, it has been held, does not violate the interstate law: *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. ed. 793.

The difference between our case and the cited case is not very great.

If it were possible to evade the law by taking the aigrettes to New York and reshipping ²⁹⁵ them back here, the statute, intended for the protection of home birds, would be a dead letter.

Another well-considered decision is pertinent, viz.: *People v. Hesterberg*, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A., N. S., 165.

In that case the court said: “The preservation of such game is the valid exercise of the police power of the state.”

GAME LAWS.

To the argument that the act deprives persons of their liberty or authorizes seizures without due process of law, and that in consequence it is violative of section 8 of article 1 of the constitution of the United States, it is sufficient answer to state that the trend of the decisions does not sustain the contention of the defendant.

Game laws have been enacted in nearly all of the states, and have been sustained by the courts as measures to prevent the useless destruction of birds. They are not in restraint of liberty of trade. Securing evidence against those

who violate the law is not seizure and confiscation of property. It does not interfere with private property. These birds belong to the public, and the public may, through the law-making power, protect them and prohibit their sale.

The present law is in accord with game laws adopted to prevent the useless destruction of birds. True, it is drastic, and goes further than most game laws. Yet it is not pointed out in what respect it violates the organic law.

THE FINE WAS IMPOSED FOR EACH BIRD KILLED.

In another respect defendant's contention is that the act violates the constitution of the United States by imposing excessive fines.

The case of *Garvey v. Whitaker*, 48 La. Ann. 527, 19 South. 457, 35 L. R. A. 561, in which the recorder erroneously assessed the penalty ²⁹⁶ of twenty-five dollars or imprisonment for each plant destroyed, aggregating eighteen hundred dollars or six years' imprisonment for one night's vandalism, is cited as authority. The case here is different.

The penalty of Act No. 48, page 105, of 1904, specifies that a fine shall be imposed for each bird killed. In the cited case the sentence of the recorder divided a penalty which is not divisible and imposed separate fines.

It was alleged that the feathers in question were bought before Act No. 48, page 105, of 1904, was adopted.

We are relieved from the necessity of passing upon this point, for learned counsel concede that, while the evidence clearly showed that the defendant had imported these feathers for hats from foreign countries long prior to the passage of the act of 1904, still that they will assume on this application that the court will not inquire into the guilt or innocence of the defendant, and that, therefore, they will confine their arguments to the constitutional objections raised to the pleadings.

It is therefore ordered, adjudged, and decreed that the rule nisi is recalled, and applicant's demand is rejected, and his petition dismissed, at his costs.

The Wild Game in a State belongs to the people thereof in their sovereign capacity, who may regulate or absolutely prohibit its taking and sale: *State v. Niles*, 78 Vt. 266, 112 Am. St. Rep. 917 and cases cited in the cross-reference note thereto; *State v. Weber*, 205 Mo. 36, 120 Am. St. Rep. 715.

FRERET v. TAYLOR.

[119 La. 307, 44 South. 26.]

MARRIED WOMEN—Right to Contract, Sue and be Sued as Feme Sole—Conflict of Laws.—A married woman having the right under the law of her domicile to enter into a contract as a feme sole and to sue and be sued without her husband being joined as a party, her status, as to contracting and suing and being sued, accompanies her to another state, especially when no community rights or obligations are involved. (p. 525.)

MARRIED WOMEN, Actions Against—Joinder of Husband—Conflict of Laws.—Laws enacted by certain states for the protection of married women by requiring the authorization of their husbands to their contracts and to be joined with them in suits thereon are personal statutes, and if in the state where the parties have their domicile such protective laws are not deemed necessary, it is not the duty of other states in which such parties may chance to temporarily sojourn to safeguard their rights or restrict their actions in a manner or to an extent other and different from what is provided in the state of their domicile. (pp. 525, 526.)

MARRIED WOMEN—Suits Against—Joinder of Husband—Conflict of Laws.—If a married woman having the right under the law of her domicile to contract, sue and be sued as a feme sole is sued upon a contract made by her personally and alone in another state, and she applies for and obtains authority to file an answer in such suit, she thereby joins issue with the plaintiff on his demand upon filing her answer, and has full power to present all her defenses. The authority to file such answer carries with it, as a legal consequence, the right to make good, if she can, independently of her husband, all the allegations of such answer. (p. 526.)

L. Saxon and H. G. Stewart, for the appellant.

Hall & Monroe and Dinkelspiel, Hart & Davey, for the appellees.

300 **NICHOLLS, J.** On the 14th of September, 1905, the plaintiff leased to Mrs. Alice A. Taylor, the defendant herein, the two residences, known as "1519 and 1525 Joseph street," in the city of New Orleans, for the term of three years, commencing on the 1st of October, 1905, and ending on the 30th of October, 1908, for and in consideration of a monthly rental of one hundred and fifty dollars, payable monthly. In the act of lease it was declared that the lessee had executed and delivered to plaintiff notes in representation of the different installments of rent; but in point of fact such notes were not delivered nor executed. One of the stipulations of this lease was that, on failure of the lessee to pay the rent punctually at maturity, the rent for the whole unexpired term of the lease should, without putting

the lessee in default, become at once due and exigible, and in case it became necessary to put the claim in the hands of an attorney for collection, the lessee should pay, as counsel fees, an additional sum of ten per cent on the sum so due and exigible, and, should the lessee in any manner violate any of the conditions of the lease, the lessor reserved to him the right of immediately canceling the lease without putting the lessee in default; the lessee expressly waiving the legal notice to vacate the premises. The lessee agreed to make no sublease, in whole or part, without the consent of the lessor.

On the 28th of March, 1906, the plaintiff instituted the present suit against defendant, asking judgment against her for the sum of four thousand seven hundred and fifty dollars, with interest from judicial demand, and recognition of his lessor's privilege upon all the property and furniture in the leased premises. In his petition plaintiff alleged that defendant had defaulted in paying part of one of the rent installments, and under the stipulation stated the rent for the whole unexpired term of the lease had become due and exigible.

310 A writ of provisional seizure was ordered to issue, and did issue, as prayed for, under which the sheriff seized the property and furniture in the leased premises.

On the 28th of March the defendant, under authority of the court so to do, filed a motion to dissolve the writ of provisional seizure on the grounds (1) that the lease declared on was illegal and of no effect, for the reason that she was a married woman, and was so at the time of the signing of the lease, and she was not authorized by her husband to contract for or sign the lease; (2) that she was sued as a widow on said lease, when in truth and in fact she was a married woman, not separated from bed and board, nor divorced from her husband, and she could not stand in judgment in the suit, as the debt sued on was a community debt.

A sister of the defendant, a Mrs. Watkins, making affidavit that the furniture seized belonged to her, the sheriff compelled the plaintiff to furnish an indemnity bond. The husband of Mrs. Watkins intervened, claiming ownership of the furniture, and asked for an injunction against the sale. The court heard evidence on the intervention and the rule to dissolve, and dismissed both.

The defendant, then, with and under the authority of the court, filed an answer.

In this answer she denied that she was a widow, as claimed to be in the petition, and averred that she was a married woman, and was such at the date of the signing of the lease, and that she had always been known as a married woman; that she had never been judicially separated from her husband, who was then living in the city of St. Louis, Missouri, and that, in no event, could she be held liable for the debts of her husband, as was being attempted, the debt sued on being a debt of the community existing between herself and her husband, for which he alone was liable; that, even in the event she could be held liable for the debt, she had not been ⁸¹¹ properly brought into court, as plaintiff's petition did not show that she was joined with her husband to aid and assist her, or in the absence of her husband, by the court, as the practice and the procedure of the Code of Practice provided in such cases. She denied that she was indebted unto the plaintiff whatever, under the lease as sued on. Assuming the position of plaintiff in reconvention, she prayed for a judgment for five hundred dollars for counsel fees, that her right to demand further damages be reserved, and that the writ of provisional seizure be set aside. The district court rendered judgment in favor of the plaintiff against the defendant for eleven hundred and fifty dollars, with interest thereon, for one hundred and fifteen dollars attorney's fees, with recognition and maintenance of plaintiff's landlord's lien and privilege on the property leased. Defendant has obtained and perfected a devolutive appeal from the judgment.

On the trial of the case an issue was raised as to whether or not the course of the plaintiff was due, as he claimed it was, to representations made by the defendant, prior to and at the time of the signing of the lease, that she was a widow, by reason of which fact she was estopped from asserting or claiming that she was not such. A good deal of testimony was taken on that point, which was evidently decided by the trial judge adversely to the defendant. The evidence established as a fact that she was a married woman prior to and at the time of the signing of the lease; that her husband was then, and is still, living at St. Louis; that he gave her no authority to make the lease or to stand in judgment in the present suit; that, though she and her husband were living apart, they had never been judicially separated or divorced; that her legal domicile was in the state of Missouri; that her

husband had never lived in Louisiana, nor consented to his wife's coming to live in Louisiana; that there is presently ³¹² pending in Missouri a suit brought against her by her husband for a divorce for desertion and ill-treatment.

On the trial plaintiff offered in evidence section 4335 of the Revised Statutes of Missouri of 1899 [Ann. Stats. 1906, p. 2378], which is as follows:

“Sec. 4335. Wife deemed feme sole for what purposes.— A married woman shall be decreed a feme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered against her, and may sue or be sued at law, or in equity, with or without her husband being joined as a party: provided a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property”: Rev. Stats. 1889, sec. 6864.

It will be noticed that in none of the pleadings filed by her does she assert or pretend that the property provisionally seized belongs to herself. It will be also noticed that the trial judge authorized her to file an answer in this case and that she has acted under such authority.

The defendant is temporarily within the state, without the consent or authority of her husband, and there is nothing before us tending to show that she acquired any property here. There is certainly none involved in the present litigation. The issue as to the ownership of the property seized is one entirely between the plaintiff and Watkins and his wife. Defendant has only been brought into court (as disclosed by the evidence) touching her personal liability for a debt contracted by herself. Having the right under the law of her domicile to enter into contracts as if a feme sole, her capacity to do so accompanies her wherever she may go, and her liability on such contracts is not extinguished by the fact that she may have exercised her legal right as this defendant ³¹³ did into another state. Laws enacted by certain states for the protection of married women, by requiring the authorization of their husbands to their contracts, are personal statutes, and if, in the state where the parties have their domicile, such protective laws

are not deemed necessary, but really more narrow and restrictive than they should be, it is not the duty of the states in which those parties may chance to temporarily sojourn to safeguard their rights or restrict their actions in a manner or to an extent other and different from what is provided for in the state of their domicile.

We think these remarks apply equally to protective statutes requiring women to be authorized by their husbands to stand in judgment in suits or to have their husbands joined with them in such suits. In the case at bar defendant herself sought and obtained the authority of the trial judge to file her answer. When she availed herself of the authorization and went into court, as she undoubtedly had the right to do, she joined issue with the plaintiff upon his demand, and from that time forward, if not before, she had full power to present all of her defenses. The authority to file the answer carried with it, as a legal consequence, the right to make good, if she could, all the allegations of that answer.

We find no error in the judgment appealed from, and it is hereby affirmed.

On Conflict of Laws as affecting the rights and obligations of married women, see the note to Locke v. McPherson, 85 Am. St. Rep. 552.

TRAVIS v. KANSAS CITY, SHREVEPORT AND GULF RAILROAD COMPANY.

[119 La. 489, 44 South. 274.]

RAILROADS—Liability of Lessor for Injury to Employé of Lessee.—In the absence of charter or statutory authority to lease its road, a railroad company is not liable to an employé of the lessee company for a breach of duty arising under the contract of employment, as, for instance, the duty of providing a safe place to work in. (p. 527.)

RAILROADS—Master and Servant—Safe Place to Work in.—The duty of the master to furnish the servant a safe place to work in is nothing more than one of the implied obligations of the contract, and is not a duty arising from the general relation which a railroad company occupies toward the public, or toward the servant as one of the public. (p. 528.)

MASTER AND SERVANT—Safe Place to Work in.—The question of what light shall be furnished to an employé to work by on the premises of the employer is one strictly between the employé as such and the employer as such, independent of any duty which the employer may owe to the public. (p. 528.)

Alexander & Wilkinson, for the appellant.

Hall & Jack, for the appellee.

⁴⁸⁹ PROVOSTY, J. Plaintiff's husband was a brakeman on one of the yard, or switching, locomotives of the defendant company. The defendant company's railroad was being operated by another railroad company under some agreement between the two companies, and ⁴⁹⁰ the contract of plaintiff's husband was with the operating company. He was crushed to death in a collision between the locomotive he was working on and a lot of dead cars that stood in the darkness on the yard of the defendant company. Plaintiff sues for his death, alleging that it occurred through the negligence of the defendant company in having failed while constructing the road to make provision for lighting the yard, and through the negligence of both companies in not having lighted said yard.

Plaintiff invokes the doctrine of *Muntz v. Algiers R. Co.*, 111 La. 423, 100 Am. St. Rep. 495, 35 South. 624, 64 L. R. A. 222, and *Hamilton v. Louisiana & N. W. R. R. Co.*, 117 La. 243, 41 South. 560, 6 L. R. A., N. S., 787, to the effect that, in the absence of charter or statutory permission to lease its road, a railroad company is held answerable for the breach on the part of its lessee of any of those duties imposed upon the lessor company by its charter or by law in favor of the public; that is to say, of carrying freight and passengers safely and of operating with due care to the safety of the public generally.

In considering the liability of the lessor company, however, the courts have made a distinction between an employé and the public generally, holding that the employé cannot recover for the breach of a duty arising under the contract of employment, as, for instance, the duty of providing a safe place to work in: *East Line & Red River R. Co. v. Culbertson*, 72 Tex. 375, 13 Am. St. Rep. 805, 10 S. W. 706, 3 L. R. A. 567; *Baltimore & O. Ry. Co. v. Paul*, 143 Ind. 23, 40 N. E. 519, 28 L. R. A. 216; *Caruthers v. Kansas City etc. Ry. Co.*, 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737; *Axline v. Toledo etc. R. Co. (C. C.)*, 138 Fed. 169; *Beltz v. Baltimore & O. R. Co. (C. C.)*, 137 Fed. 1016; *Williard v. Spartanburg etc. R. Co. (C. C.)*, 124 Fed. 796; *Hukill v. Maysville etc. R. Co. (C. C.)*, 72 Fed. 745; *Curtis v. Cleveland etc. R. Co. (C. C.)*, 140 Fed. 777; ⁴⁹¹ *Yeates v. Illinois C.*

R. R. Co. (C. C.), 137 Fed. 943; *Hanna v. Chattanooga & N. Ry. Co.*, 88 Tenn. 310, 12 S. W. 718, 6 L. R. A. 727.

The duty of the master to furnish the servant a safe place to work in is nothing more than one of the implied obligations of the contract: *Bailey on Master's Liability for Injury to Servants*, p. 1. It is not a duty arising from the general relation which the railroad occupies toward the public or toward the servant as one of the public.

The learned counsel for plaintiff argues that this duty to light the yard was a duty owing to the public by the lessor company, and not one merely arising out of the contract. We take a different view. We think that the question of what light shall be furnished to the employé to work by on the premises of the employer is one strictly between the employé as such and the employer as such.

The exception of no cause of action should have been sustained.

Judgment set aside, and suit dismissed.

The Liability of a Lessor Railway Corporation for the acts and negligence of the lessee company is discussed in the notes to *Lee v. Southern R. R. Co.*, 58 Am. St. Rep. 147; *Ohio etc. R. R. Co. v. Dunbar*, 71 Am. Dec. 295. In *Ackerman v. Cincinnati etc. R. R. Co.*, 143 Mich. 58, 114 Am. St. Rep. 640, it is held that the lessor railroad company was relieved from responsibility for the acts of the lessee in the repair and maintenance of the road. But in *Mantz v. Algiers etc. Ry. Co.*, 111 La. 423, 100 Am. St. Rep. 495, a street railroad corporation was held liable for the negligent operation of the road by another company to which it had leased it. And in *Harden v. North Carolina R. R. Co.*, 129 N. C. 354, 85 Am. St. Rep. 747, it was held that a railroad company, under a charter authority to "farm out the right of transportation," cannot relieve itself from liability for any acts or torts committed by its lessee.

SUCCESSION OF GABISSO.

[119 La. 704, 44 South. 438.]

DIVORCE—Adultery—Identification of Accomplice.—If a petition for divorce charges adultery between the defendant and a named accomplice as the sole ground therefor, and the judgment of final divorce recites that it was rendered after due proof, although the evidence is not preserved, the identification of the accomplice is sufficient for the purposes of a statute prohibiting and declaring null marriage between a person divorced for adultery and his or her accomplice therein. (p. 533.)

MARRIAGE AND DIVORCE—Prohibited Marriages.—Under a statute prohibiting and declaring null marriages between persons who are divorced for adultery and their accomplices therein, a marriage between one who has been divorced for adultery and the accomplice therein with knowledge of the marriage is absolutely void and without civil effects. (p. 534.)

CONSTITUTIONAL LAW—Prohibited Marriages.—A constitutional provision prohibiting marriages between certain persons is self-acting, if there is no other provision in the constitution limiting its operation. (p. 535.)

MARRIAGE—Validity—Conflict of Laws.—If a citizen and resident of one state, whose status is governed by its laws, goes into another state and there contracts a marriage, which, from considerations of morality and public policy, he is prohibited from contracting at home, such marriage is void in the state of his domicile. (pp. 535, 536.)

MARRIAGE—Validity—Limitations.—The plea of prescription cannot avail to sustain or protect an absolutely void marriage contracted in contravention of public policy and good morals and not susceptible of ratification. (p. 536.)

DESCENT AND DISTRIBUTION—Estoppel Against Heirs.—Brothers and sisters, by renouncing the succession of a deceased brother in favor of their mother, do not thereby estop themselves from contesting the right of the children of such brother to share in the mother's estate. (p. 536.)

Hall & Monroe, for the appellants.

E. H. McCaleb, for the appellees.

705 MONROE, J. Mrs. Catherine Gabisso, widow of Joseph Frigerio, Jr., died in this ⁷⁰⁶ city March 12, 1906, leaving six children, to wit, Angele, divorced wife of Guiseppe Vagge, Therese, Louis, Alphonse, John, and James, and leaving a will whereby she bequeathed the disposable portion of her estate to her two daughters and appointed them her executrices. After letters testamentary had been issued, and an inventory taken, Mrs. Louise Cuevas presented to the court a petition alleging that she is the widow of Joseph Louis Frigerio, predeceased son of Mrs. Catherine Frigerio and father of two minor children of whom petitioner is the

mother and guardian, and praying that the minors be recognized as forced heirs of their grandmother and sent into possession of an undivided one-seventh interest in her estate. To this petition the above-named children and heirs of Mrs. Catherine Frigerio answer, admitting that their brother, Joseph Louis, died in 1896, but denying that the minors represented by plaintiff are forced heirs of Mrs. Catherine Frigerio, or that they are entitled to any part of the property left by her, or that Mrs. Louise Cuevas was ever lawfully married to their brother. Further answering, they allege that on May 15, 1892, the date upon which such marriage is said to have been celebrated, Louise Cuevas and Joseph Louis Frigerio were residents of Bay St. Louis, Mississippi; that Louise Cuevas was a person having one-eighth, or more, of negro blood, whilst Joseph Louis Frigerio was a white man; that marriage between such persons was prohibited by the law of Mississippi; and that, if the two mentioned entered into a marriage, the same was null and void. They further allege that on September 30, 1882, Joseph Louis Frigerio was married, in Switzerland, to Emma Rochat, and thereafter established a matrimonial domicile in New Orleans, but that he also lived, both in this city and at Bay St. Louis, in open adulterous concubinage with Louise Cuevas; that in September, 1891, his wife brought suit for ⁷⁰⁷ divorce, assigning said adultery and concubinage as her cause of action, and obtained judgment therein, in December following, that, under the Civil Code, article 161, said Joseph Louis Frigerio could not thereafter legally have married his accomplice in such wrongdoing, and that such marriage can have produced no civil results, as the same was contracted with knowledge of the facts and in bad faith. To the attack upon her marriage, plaintiff pleads the prescription of five and ten years. She also pleads estoppel, resulting, as she alleges, from the fact that defendants renounced the succession of their brother, Joseph Louis Frigerio.

The facts of the case are as follows: In 1882, Joseph Louis Frigerio married Emma Rochat and brought her to live in New Orleans, as alleged in the answer. In 1888, being then employed as a clerk and watchmaker in his mother's store, he made an acquaintance with Louise Cuevas, which ripened into an illicit connection, and resulted in his bringing her (from Bay St. Louis, where she lived) to this city and here living with her in concubinage, and in his wife's bringing

suit against him for, and obtaining judgment of, final divorce, on the ground that he was committing adultery and living in concubinage with said Louise Cuevas. In the suit thus brought, defendant was cited, personally, but permitted judgment by default to be confirmed against him, in December, 1891; the fact being that he was then living with Louise Cuevas, who knew that he was a white, married man, and that she was an octoroon. On May 15, 1892, Frigerio and Louise Cuevas were married at Bay St. Louis, and, whilst they may have spent some little time there, they afterward, as before, mainly resided in New Orleans. Article 263 of the constitution of the state of Mississippi (in force at the date of the marriage in question) reads, in part: ⁷⁰⁸ "The marriage of a white person with a negro, or mulatto, or a person having one-eighth, or more, of negro blood, shall be unlawful and void."

And the statute law, thereafter enacted to conform to the constitution, imposes a penalty for such marriages beyond that of nullity: Ann. Code Miss., 1892, sec. 2859. In 1896, Joseph Louis Frigerio died, in New Orleans, and, defendants having renounced his succession, his mother (who was advised that his marriage was void) was put in possession of his estate, as his sole heir, though it does not appear that he left anything of value; the purpose in opening his succession having been, in all probability, to clear the title of certain real estate which had belonged to the community formerly existing between his parents.

The alleged marriage relied on by plaintiff was, as we have seen, prohibited, on pain of nullity, and denounced an offense, where made. For another reason, it was placed in the same category by the law of the man's domicile, since article 161 of the Civil Code of this state reads: "In case of divorce, on account of adultery, the guilty party can never contract matrimony with his, or her, accomplice in adultery, under penalty of being considered and prosecuted as guilty of bigamy, and under penalty of the nullity of the marriage."

Plaintiff's counsel opens his argument by saying: "It being conclusively established that Joseph Louis Frigerio, deceased, was always domiciled in New Orleans, and Louise Cuevas was, up to the time of her marriage, domiciled in Bay St. Louis, Miss., it therefore follows that his capacity to contract marriage, and the validity of the marriage itself, are governed exclusively by the laws of his domicile."

He then contends that the article of the Civil Code cited has no application because plaintiff, as he alleges, is not sufficiently identified as the accomplice in adultery of Joseph Louis Frigerio; her name not being ⁷⁰⁰ mentioned in the judgment of divorce obtained against him, or in any reasons for judgment, or in any testimony given in support thereof, so far as shown by the record; and this view was adopted by the judge a quo, who seems to have been of the opinion that the article finds its application only in cases where the judgment of divorce mentions the name of the accomplice. This theory, however, finds no support in the language of the law, and the idea that it is supported by interpretations placed by French jurists on article 298 of the Code Napoleon appears to us to be based upon a misapprehension. The article of the French code reads: "Art. 298, Dans le cas de divorce admis en justice pour cause d'adultère, l'époux coupable ne pourra jamais se marier avec son complice. La femme adultère sera condamnée par le même jugement et sur la réquisition du ministère public, à la reclusion dans une maison de correction pour un temps déterminé, qui ne pourra être moindre de trois mois, ni excéder deux années."

It will be seen that, where the accomplice is a woman, this law requires that, upon the demand of the minister, she shall be condemned by the same judgment that awards the divorce, and that, upon the other hand, unlike our law, it does not denounce as null marriages contracted in violation of its prohibition. The French jurists, therefore, in the main, concur in the view that it is merely prohibitive, or, as we would say, directory; but they also concur that, construed in that way, it finds its application in any case where, from all the facts and circumstances, and without a specific judicial finding to that effect, a particular person is identified as the accomplice; the idea being expressed by one of the commentators as follows: "Dans toutes les hypothèses qui viennent d'être examinées, la qualité de complice resultera donc, soit d'une pièce de la procédure, soit d'une mention contenue dans le jugement. Or l'article 298, n'exigeant que la qualité de complice soit établie d'une manière particulière, il suffit, comme l'a décidé la cour de Paris, que de l'ensemble des faits et circonstance de l'affaire, et sans qu'il soit besoin d'une constatation judiciaire, le nom du complice apparaisse d'une ⁷¹⁰ façon certaine et incontestable": Huc, Tome 2, c. 111, art. 298; Effets du Divorce; Code Civil. See, also, Demante-Code

Civil, Tome 1, p. 528, No. 367; Baudry-Lacontinerie, vol. 3, p. 164, No. 259; Dalloz-Code Civil, Tome 1, art. 298, p. 559; Laurent, vol. 2, No. 484.

Counsel for plaintiff, referring to Mrs. Emma Frigerio's petition for divorce, says: "There are two charges in the petition: 'That her husband is guilty of adultery, and is now living in open concubinage with one Louise Cuevas, at No. 153 St. Anthony street, in New Orleans.' Adultery with whom we know not, for the name is not disclosed, and concubinage with Louise Cuevas, are both charged in the averment. We are left in ignorance as to which charge, if either, or both, was proven or not."

In the petition for divorce, as copied in the transcript, we find no comma after the word "adultery"; the charge reading: "That her said husband is guilty of adultery and is now living in open concubinage with one Louise Cuevas," etc.—which, as we understand the language, means to say that the petitioner's husband is now guilty of adultery with one Louise Cuevas and is now living in open concubinage with one Louise Cuevas, and we should be disposed to adopt that interpretation, even if there were a comma where the learned counsel has, inadvertently, placed it, since there are few lawyers, we imagine, who do not know that proof would be inadmissible in support of a bare allegation of adultery, without specification of person, time, or place: *Compton v. Compton*, 9 La. Ann. 499. The name of the accomplice is therefore declared on the face of the petition. There was, and is, no law requiring the testimony to be reduced to writing or otherwise preserved in the record; and it would have been entirely outside of the law, and unheard of, for the judge to have mentioned the name of the accomplice, who was not before him, in the judgment, the whole of which, save the merely formal parts, reads as follows: ⁷¹¹ "On motion of Ker & Duvigneau, of counsel for plaintiff, and on producing due proof in support of plaintiff's demand, the law and the evidence being in her favor: It is ordered, adjudged and decreed that the judgment by default, herein entered on November 13, 1891, be now confirmed and made final, and, accordingly, that there be judgment in favor of plaintiff, Emma Rochat, wife of J. Louis Frigerio, against said J. Louis Frigerio, her husband, decreeing a divorce a vinculo matrimonii, forever dissolving the bonds of matrimony heretofore existing between them, and

costs of suit.” Rendered December 14, and signed December 19, 1891.

Apart from the presumption to that effect, the recital, signed by the judge, that due proof was administered, is as good evidence of that fact as could well be furnished, and, as no proof could have been administered, under the pleadings, and none other was needed, to have authorized the judgment rendered, save proof of the adultery and concubinage alleged, the identification of the plaintiff herein as the accomplice is necessarily complete.

Beyond this, and if any corroborative evidence were needed to support what appears to us to be a plain proposition, it has been abundantly shown, in the instant case, that in September, 1891, when the divorce suit was begun, J. Louis Frigerio was, as a matter of fact, living in concubinage with plaintiff on St. Anthony street, in this city, and that on the 17th of that month he registered the death of an infant, two days old, to which he gave an assumed name, but which was the issue of that relation. By virtue, therefore, of the explicit declaration of the law to that effect, his subsequent marriage with plaintiff was absolutely void, and, having been made in bad faith, by both of the contracting parties, is without civil effects: Succession of Taylor, 39 La. Ann. 823, 2 South. 581; Succession of Minvielle, 15 La. Ann. 342.

In the Hernandez case (46 La. Ann. 962, 15 South. 461, 24 L. R. A. 831), upon which the learned judge a quo seems to have relied, the syllabus reads, in part, as follows: “The prohibition of article 161 of the Civil Code . . . is directed against marriage between ⁷¹² the guilty spouse and the particular person, or persons, who are designated in the petition for divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded.”

And this syllabus is sustained by the text of the opinion; it being there found by the court that the action for divorce, then under consideration, was not founded on any charge of adultery in which the second wife of the divorcee was alleged or shown to have been a participant, and the fact being that it was not shown that her name had been mentioned in the divorce suit, either in the pleadings, the evidence, or the judgment: Succession of Hernandez, 46 La. Ann. 962, 15 South. 461, 24 L. R. A. 831.

In view of the statement which the learned counsel makes in the opening of his argument, and which we have heretofore

quoted, there would seem to be nothing more to be said upon the subject of the validity of the marriage in question. Further along in the counsel's brief, however, we find the following, to wit: "Defendants encounter another insuperable obstacle to the pretended invalidity of the marriage. . . . The disability to remarry, after divorce, attaches only by way of penalty, within the state, and a valid marriage may be contracted in another state which will be recognized in the former state where the divorce was granted."

And, upon the basis of the proposition thus stated, it is argued that plaintiff's marriage at Bay St. Louis was valid, because the statute law of Mississippi, then in force, prohibited marriages only between white persons and persons having one-fourth negro blood, and it is said that the provisions of the constitution, bringing persons having one-eighth negro blood within the prohibition, had not become operative. We do not, however, so understand the situation. It is undisputed that the constitution had been adopted and was in force, so far as it was self-acting, and article 263, as we have seen, reads: ⁷¹⁸ "The marriage of a white person with . . . a person who shall have one-eighth, or more, of negro blood shall be unlawful and void."

It seems clear that no then existing statute fixing the permissible limit of negro blood at one-fourth, could be invoked as controlling the language thus used in the constitution, save by virtue of some other provision of the constitution itself, and no such other provision has been called to our attention, which can avail the plaintiff. To the contrary, article 274, which has been offered in evidence, provides that, with certain exceptions, the laws repugnant to the constitution should continue in force only until April 1, 1892, and plaintiff's marriage was not celebrated until May 15, 1892. Apart from that, the proposition that, when a citizen and resident of Louisiana, whose status is governed by its laws, goes into an adjoining state and there contracts a marriage, which, from considerations of morality and public policy, he is prohibited from contracting at home, the law of his domicile can be invoked to give effect to such marriage and its consequences, is untenable. The court has said: "We understand the rule to be well settled that marriages, valid by the law of the country where they are entered into, are valid in any other country to which the parties may remove, unless there exists, from reasons of public policy, in the country to which they remove,

some impediment by the laws of that country, or that such marriages are in derogation of good morals. In such exceptional cases, comity could not be invoked to recognize their validity": Succession of Caballero v. Executor, 24 La. Ann. 575; Saul v. His Creditors, 5 Mart. (N. S.) 569, 16 Am. Dec. 212; Dupre v. Bonard's Exr., 10 La. Ann. 411; Babin v. Le Blanc, 12 La. Ann. 367; Succession of Taylor, 39 La. Ann. 823, 2 South. 581.

And in other jurisdictions it is held that: "The rule that a marriage valid where celebrated is valid everywhere is subject to the exception that foreign marriages, though valid where celebrated, will not be recognized as valid if they are: First, polygamous; second, incestuous; or, third, in other respects obnoxious to the laws and the public policy of the country where such marriages are assailed": 19 Am. & Eng. Ency. of Law, pp. 1211, 1212.

"Another exception to the rule—that the *lex loci* governs the validity of marriages—is that marriages in evasion of the laws of the domicile will not be recognized as valid": 19 Am. & Eng. Ency. of Law, p. 1213.

The marriage here relied on, being an absolute nullity in contravention of public policy and good morals, was not susceptible of ratification, acquired no validity by the lapse of time, remains open to attack, and cannot serve as the basis of an action; in short, in legal contemplation, it has never existed. The plea of prescription cannot therefore avail to sustain or protect it: Vaughan v. Christine, 3 La. Ann. 328; Succession of Minvielle, 15 La. Ann. 342. As the defendants are not now claiming anything that they surrendered, in renouncing their brother's succession in favor of their mother, it does not appear to us that they are affected by any estoppel.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that plaintiff's demand be rejected, and this suit dismissed, at her costs in both courts.

On What Marriages are Void, see the note to State v. Lowell, 79 Am. St. Rep. 361. As a rule, a marriage that is valid at the place where celebrated is valid everywhere, unless it contravenes the law as generally recognized by Christian nations, or is declared invalid by the local law-making power: Penegar v. State, 87 Tenn. 244, 10 Am. St. Rep. 648; Commonwealth v. Graham, 157 Mass. 73, 34 Am. St. Rep. 255; Estate of Wilbar, 8 Wash. 35, 40 Am. St. Rep. 886; State v. Shattuck, 69 Vt. 403, 60 Am. St. Rep. 936.

ROGERS v. SOUTHERN FIBER COMPANY.

[119 La. 714, 44 South. 442.]

CORPORATIONS—Liability for Acts of Agent.—A corporation, like an ordinary person, is responsible only for those acts of its agent which have been done in its name, and it is not liable for those which have been done in the agent's own individual name. (p. 539.)

CORPORATIONS—Liability for Act of Agent—Issue of Counterfeit Stock.—If the president and local agent of a corporation, in a transaction for his individual account, delivers counterfeit instead of genuine stock of his corporation, it cannot be held liable therefor. (p. 539.)

PLEADINGS.—Evidence Received Without Objection does not have the effect of enlarging the pleadings, when such evidence is admissible under them. (p. 541.)

CORPORATIONS—Power of Agent—Issue of Counterfeit Stock. If the president and local agent of a foreign corporation acts in its name in a fraudulent transaction, and delivers counterfeit instead of the genuine stock of the corporation, and receives the money therefor, the corporation is not liable, when it did not profit by the transaction, and such agent did not have authority to receive or accept money for the corporation, and never had charge or control of, or access to, the funds of the corporation, or to its stock-books, or blank stock certificates or to its seal. (pp. 542, 543.)

CORPORATIONS—Liability for Act of Agent—Issue of Counterfeit Stock.—If the president and local agent of a foreign corporation acts in its name in a fraudulent transaction in issuing counterfeit instead of the genuine stock of the corporation, and receives the money therefor, the corporation is not liable when such agent did not have authority to issue the genuine stock of the company, and was not held out by it to the public as having any such authority, and was not in the habit of receiving subscriptions for stock, or of dealing in any way with the certificates of stock of the company, or of receiving money in its name, or for its account. (pp. 544, 545.)

CORPORATIONS—Act of Officer—Issue of Counterfeit Stock. Before a corporation can be made liable in any way for the act of its officer in issuing counterfeit stock, the officer must be shown to have had authority to issue genuine stock. (p. 545.)

CORPORATIONS—Implied Power of President—Issue of Counterfeit Stock.—The president of a corporation has not, simply by virtue of his office, the implied power of binding his corporation by a fraudulent and counterfeit issue of its stock, or by receiving money in its name to be invested in its stock. (p. 545.)

P. A. Lelong, Jr., A. W. Cooper and Hall & Monroe, for the appellants.

E. H. McCaleb, for the appellee.

⁷¹⁵ PROVOSTY, J. The plaintiff alleges that he purchased for three thousand five hundred dollars, from one Lawrence, thirty-five shares of stock of the Southern Fiber Company, ⁷¹⁶ a corporation organized under the laws of

Maine; that said company claims that said stock is counterfeit; and that said company is liable in solido with said Lawrence for the said amount paid by petitioner for the said counterfeit stock for the following reasons:

“First. That said Southern Fiber Company held out and represented said Abbott W. Lawrence as its president, agent, and representative, placed in his hands certificates of stock and the seal of the said corporation, and thus enabled him to defraud plaintiff out of the sum of three thousand five hundred dollars, the price paid for said stock, evidenced by said forged certificate. That said Southern Fiber Company is liable for the fraud of its president and for his acts and doings; they having placed it in his power to cheat and defraud plaintiff, and are therefore liable in solido with him for said amount.

“Second. That said Southern Fiber Company, by its acts and doings, aided, abetted, and assisted the said Abbott W. Lawrence in defrauding plaintiff out of said amount of three thousand five hundred dollars paid to him for said stock, now appearing to be fraudulent and fictitious.

“Third. That, although aware of the fraudulent acts and doings of said Abbott W. Lawrence, the said Southern Fiber Company retained him in its employ as president, concealed and covered up his frauds, thereby holding him out to the public as honest and trustworthy, and enabling him to cheat and defraud plaintiff by selling and delivering to him the said forged certificate of stock, which plaintiff alleges to be forged and fictitious.”

Plaintiff annexed and made part of the petition the following exhibit:

“New Orleans, May 1, 1905.

“Received from Rufus W. Rogers thirty-five hundred dollars, in full payment for thirty-five shares of Southern Fiber Company stock, certificates to be delivered.

“(Signed) SOUTHERN FIBER COMPANY,
“A. W. LAWRENCE, Pres.”

Alleging that Lawrence had absconded, plaintiff asked for an attachment, and asked for garnishment process against one Tennant Lee. The latter denied owing Lawrence anything, or having in his possession any property of his. Plaintiff traversed the answers.

The company filed an exception of no cause of action. This exception was referred to the merits. With reserve of this exception, the company answered to the merits, denying ⁷¹⁷ both generally and specially the allegations of the petition.

There was judgment condemning Lawrence and the company in solido to pay the three thousand five hundred dollars, and condemning the garnishee to pay three thousand dollars; and these parties have appealed.

The sum of the complaint against the defendant company, as contained in the petition, is that, although said company knew, from the fraudulent conduct of Lawrence in the past, that he was an untrustworthy person, yet it continued him as its agent and president, and confided to him certificates of its stock and seal, thereby holding him out to the world as a trustworthy person, and aiding, abetting, and assisting him in his fraud.

These facts, if taken for true, would not, in our opinion, make the defendant company liable. The proposition is a plain one that a corporation, like an ordinary person, is only responsible for those acts of its agent which have been done in its name, not for those which have been done in the agent's own individual name. The latter acts are the agent's own, and, no matter what their nature may be, whether sales of corporation stock, or of livestock, or horse trades, he alone is responsible for them.

There is no allegation in the petition that the selling of certificates of stock, or the issuing of certificates of stock, or the receiving of money for subscriptions of stock, came within the scope of the functions of Lawrence as agent and president of the defendant company; but, even if the petition had contained such an allegation, still it would not have shown a cause of action, so long as it continued to allege that Lawrence was acting for himself and in his own individual interest in the transaction.

“It is an old doctrine, from which there has never been any departure, that an agent cannot bind his principal even in matters touching his agency, where he is known to be acting for himself, or to have an adverse interest: Authorities. . . . The plaintiff in such a case assumes the ⁷¹⁸ risk of the agent's disloyalty to his trust, and has no occasion for surprise when he discovers that the agent has served himself more faith-

fully than his principal: *Manhattan Life Ins. Co. v. Forty-second St. & G. St. F. Co.*, 139 N. Y. 146, 34 N. E. 776.

“When purchaser from corporate officer bound to investigate his authority. One who accepts newly issued certificates of stock from an officer of a corporation, who has authority from the corporation to sign, seal, and issue for the corporation certificates of its stock, as collateral security for a personal loan made to the officer, is bound to inquire whether the officer has authority to issue the certificates for the purpose intended; and, if he does not make such inquiry, and the officer in fact issues them in fraud of the rights of the corporation, he takes them subject to those rights”: 2 Thompson on Corporations, sec. 2606.

“An agent cannot properly act for his principal when their interests are adverse; and any person dealing with an agent in a matter affecting his principal, and knowing that the interests of the agent are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by the principal”: *Farrington v. South Boston R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109, 5 L. R. A. 849.

“One purchasing stock, even from an officer of a corporation having power to issue certificates of stock, is put upon inquiry as to his authority to bind the corporation, if the officer is dealing for himself personally or has an interest adverse to his principal. If the purchaser fails to make such inquiry, he deals with the officer at his peril, is not an innocent purchaser, and assumes the risk of the agent’s disloyalty to his trust”: 3 Clark & Marshall on Corporations, sec. 711b; 2 Thompson on Corporations, secs. 2600, 2606; *Manhattan Life Ins. Co. v. Forty-second St. etc. R. R. Co.*, 139 N. Y. 146, 34 N. E. 776; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109, 5 L. R. A. 849; *Moore v. Citizens’ Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. Rep. 345, 28 L. ed. 385; *Wright’s Appeal*, 99 Pa. 425.

The lower court should have sustained the exception of no cause of action, and dismissed the suit of plaintiff.

The learned counsel for plaintiff argues the case as if the transaction in question, instead of having been with Lawrence individually, as is distinctly alleged in the petition, had been with the defendant company through Lawrence acting as its president. He contends that the evidence shows that the transaction was with the company, and that this evidence has

had the effect of enlarging ⁷¹⁹ or changing the pleadings; it having been admitted without objection.

The learned counsel loses sight of the fact that the defendant company did not file an answer to the merits until forced to do so by the court, and even then it did so only with full reserve of the exception of no cause of action. "*Actus curiae neminem gravabit.*" Therefore, the case must first be dealt with on this exception of no cause of action; that is to say, without consideration of the evidence in question which came into the case only on the trial on the merits.

Had the lower court sustained the exception and dismissed the suit, it would have saved itself and this court a good deal of unnecessary trouble; and perhaps the more sensible—certainly the more logical—course for this court now to pursue would be simply to sustain said exception and dismiss the suit and say nothing further. But the case having been fully tried and argued, it will be more satisfactory to the parties if the whole of it is passed on. But the court will again take occasion to exhort trial courts to try exceptions of no cause of action before, not after, the merits.

In dealing with the merits, the first question which arises is whether the pleadings have been changed by evidence admitted without objection. We think not. For two reasons: First, that a litigant who has interposed an exception of no cause of action, and only consented to file an answer when forced to do so by the court, and even then only with full reserve of the exception, as did the defendant company, cannot be presumed to have consented to such a change in the petition as would make it show a cause of action. Second, that an enlargement of the pleadings by the reception of evidence without objection takes place only when the evidence was not admissible under the pleadings (*McAdam* ⁷²⁰ v. *Soria*, 31 La. Ann. 862; *Choppin v. Dauphin*, 112 La. 103, 36 South 287), and that the evidence to which the learned counsel refers as having been admitted without objection was thus admissible; it consisting of the documents executed in connection with the transaction upon which the suit was founded, and of the testimony of plaintiff touching the same transaction, all of which had necessarily to be admitted on the trial of the case on the merits.

Conceding, however, *argumenti gratia*, that the pleadings were changed, and that the allegation of the petition is that the plaintiff intended to deal with the company, and not with

Lawrence individually, and thought he was doing so, how does the case stand?

The plaintiff testified in chief, as follows: "Lawrence came to me and said that he had thirty-five shares of stock he would like to sell of the company; he would like to get some one in who would take the whole block of thirty-five shares, and he asked me if I would take them." But, on cross-examination, plaintiff testified that he understood that he was dealing with the company.

The check which he gave was in favor of "A. W. Lawrence (Pres. Southern Fiber Company)." It was indorsed: "Southern Fiber Co., A. W. Lawrence, Pres." The receipt given for it has already been transcribed above. It was in the name of the company.

At the giving of this check, the parties executed a document by which Lawrence, individually, promised to pay plaintiff three thousand five hundred dollars in six months, with five per cent interest from date, for the same stock, in case plaintiff wished then to dispose of it, and this contract, at its maturity, was renewed for one year.

Plaintiff made no demand for the delivery of the stock, and made no inquiry whatever until some eight months thereafter, when Lawrence delivered to him the bogus stock.

The defendant company, as already stated, is organized under the laws of Maine. Its ⁷²¹ domicile was in Boston, Massachusetts. It did business in New Orleans, where it had a mill and an office. Lawrence was its president. His powers, as prescribed by the by-laws and resolutions of the company, were: "First, to preside, when present, at all meetings, either of the board or of the corporation; second, to sign, when present, all certificates of stock; third, to perform other duties incident to his office prescribed by law, by the by-laws or by special resolution of the board; fourth, to be custodian of the treasurer's bond; fifth, to lease and manage the office of the company in New Orleans, and to keep accounts and reports of the work done and material bought, and to send them to the treasurer from time to time, as he may desire, to arrange for the purchase of bagasse at a cost not over three dollars per ton delivered at the mill, to arrange for the transfer of the land purchased, and to arrange a contract for the oil supply authorized."

He did not have, and never exercised, so far as the company knew, any powers except as here prescribed; he never

had, and, so far as the company knew, never exercised, any authority to receive or accept money for the company, or to indorse checks in its behalf. He never had charge or control of, or access to, the funds of the company, or to its stock book or blank certificates of stock or to its seal. All of these matters were confided to and exercised by other officers at the domicile of the company in Boston. The company knew nothing of the untrustworthiness of Lawrence until after the transaction with plaintiff. It received not one cent of plaintiff's money, and in no way profited by it.

Article 273 of the constitution of this state provides: "Every railroad or other corporation, organized or doing business in this state, under the laws or authority thereof, shall have and maintain a public office or place in this state for the transaction of its business, where transfers of stock shall be made, and where shall be kept for public inspection books in which shall be recorded the amount of capital stock subscribed, the names of owners of stock, the amounts owned by them respectively, the amount of stock paid, by whom, the transfers of said stock, with date of transfer, the amount of its assets and liabilities, and the names and places of residence of its officers."

⁷²² The defendant company had not complied with this constitutional requirement. All it had done was to file a copy of its charter with the Secretary of State, and keep in its New Orleans office a copy of its charter and by-laws. The duties and powers of its officers were not prescribed in the charter, but in the by-laws.

The counterfeit stock delivered to plaintiff was of Lawrence's own private manufacture and was in his name. It was not on one of the blank certificates of the company, and did not resemble the genuine stock of the company. The seal was not that of the company, and the signature of the secretary and treasurer of the company on it was a forgery.

From the foregoing facts it is not clear beyond question that the shares of stock which were to be transferred to plaintiff were not such as belonged to Lawrence individually. Plaintiff's statement is that Lawrence said that "he," i. e., he, Lawrence, individually, had thirty-five shares of stock, which "he," i. e., he, Lawrence, individually, would like to "sell." This would clearly indicate that the transaction was not one by which plaintiff was to subscribe to the stock of the defendant company, and for which purpose he confided

funds to Lawrence as president of the company; but that it was one by which Lawrence individually was to sell to plaintiff thirty-five shares of stock—and the latter version is corroborated by the document which Lawrence executed in his individual name for the redemption of the stock, and by the fact that the stock which was delivered and which plaintiff accepted was in the name of Lawrence.

Nor is it clear that the laches of plaintiff in suffering seven or eight months to elapse without demanding the delivery of the stock, or even making inquiry, does not cut him off from any equity he might have had to hold the defendant company responsible.

⁷²³ But, waiving the latter point, and assuming that plaintiff understood that he was dealing with defendant company through its president, and not with Lawrence individually, still the defendant company is not liable. The learned counsel for plaintiff would seek to hold the defendant company liable on those principles of estoppel by which a corporation is liable where its officer, having authority to issue genuine stock, has defrauded an innocent subscriber by issuing counterfeit stock, and where a corporation allows an officer, habitually and in the face of the public, to perform for it and in its name certain acts, and a member of the public innocently parts with value on the faith of the officer having authority in the premises. But these principles are inapplicable, since, upon the foregoing facts, Lawrence did not have authority to issue the genuine stock of the company, and was not held out by the company as having any such authority, and was not in the habit of receiving subscriptions for stock, or of dealing in any way with the certificates of stock of the company, or of receiving money in its name or for its account.

The law thus cited by the learned counsel for plaintiff is as follows:

“The fact of forgery does not extinguish his right when it has been perpetrated by or at the instance of an officer placed in authority by the corporation and intrusted with the custody of its stock books and held out by the company as the source of information on the subject”: Clark on Corporations, p. 525; 26 Am. & Eng. Ency. of Law, 2d ed., tit. “Stock and Stockholders,” p. 875.

“Extension of authority by holding out: As in the case of other agents, the president of a corporation may acquire larger powers than those ordinarily belonging to him by be-

ing held out to the public as possessing them, and by being suffered by the directors habitually to exercise such powers in the face of the public": 10 Cyc., p. 912.

The above-quoted excerpt from Clark on Corporations is not as explicit as might be ⁷²⁴ wished. The Am. & Eng. Ency. loc. cit. is more explicit. It begins: "Where an officer of a corporation having authority to issue valid certificates," etc.

As was said by the supreme court of the United States in *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. Rep. 345, 28 L. ed. 388: "None of the cases cited by the learned counsel for plaintiff affirm a broader proposition than this: A certificate of stock in a corporation, under the corporate seal, and signed by the officers authorized to issue certificates, estops the corporation to deny its validity as against one who takes it for value with no knowledge or notice of any fact tending to show that it has been irregularly issued."

It is thus made clear that, before the corporation can be made liable in any way for the act of its officer in issuing counterfeit stock, the officer must be shown to have had authority to issue genuine stock; and the above-quoted excerpt from Cyc. is explicit to the effect that the corporation is liable for the act of its unauthorized officer only when he had been suffered to exercise such powers "habitually in the face of the public." In the instant case, not only is it not shown that Lawrence was suffered habitually to issue the stock of the defendant company, or to receive subscriptions to its stock, or to receive money in any way for the company, but the very opposite is positively and clearly established.

The utmost that plaintiff can say against the defendant company is that Lawrence was its president; but a corporation is not liable for every act the man who is its president may do. The law regarding the implied powers of the president of a corporation is very fully and satisfactorily stated in 10 Cyc. 903 et seq., and what is there said shows very clearly that the president of a corporation has, not, simply *virtute officii*, the implied power of bonding it by a fraudulent issue of its stock, or by receiving ⁷²⁵ money in its name to be invested in its stock.

The learned counsel for plaintiff charges the defendant with having ignored the above-quoted article of the constitution; but what if defendant did? That article does not say

that a corporation which fails to do the things there prescribed shall be liable for the fraudulent acts of its president.

We conclude that the defendant company is not liable, and we pass to a consideration of the case as against the garnishee, Tennant Lee.

The latter was an occupant of the office of the defendant company in New Orleans with Lawrence up to the time of the defalcation of Lawrence. Exactly in what capacity does not appear. He had charge of the office from and after the disappearance of Lawrence. Lee made an affidavit against Lawrence on February 13th, charging him with the forgery of the stock held by plaintiff, and Lawrence was seen no more from that day. On that day, a "Times-Democrat" reporter interviewed Lee; and, as the result of the interview, published in the issue of the paper of the next day (14th) the following statement: "Mr. Lee said that three thousand dollars of good stock belonging to Mr. Lawrence had been found, and was in the possession of the company. If this and any other property belonging to Lawrence that might fall into the company's hands could be legally prorated among the purchasers of bogus stock, it would be done."

Plaintiff and his then attorney, who had called to see Mr. Lee, overheard a part of this interview while they were waiting in an adjoining room. Plaintiff's then attorney says that he heard Lee say to the reporter that: "Mr. Lawrence had three thousand dollars' worth of stock in the company and that he was going to prorate it among the creditors."

Between the statement of the reporter and that of the attorney the following discrepancies are to be noted:

726 Reporter.

1. Good stock.
2. Had been found and was in the possession of the company.
3. If this or any other property that might fall in- to the company's hands could be legally prorated, it would be done.

The Attorney.

1. Stock in the company.
2. (Does not say in whose possession the stock was.)
3. He (Lee) was going to prorate it among the creditors.

After the interview with the reporter was concluded, plaintiff and the attorney had a conversation with Lee. We put side by side plaintiff's and the attorney's statements regarding what Lee said in this conversation.

Plaintiff.

Mr. Lee said he had gone up to Mr. Lawrence's house to get hold of three thousand dollars' worth of stock and that he was holding that for the company to prorate among the people who had been swindled; he was holding it for the company, not for himself for the company.

The Attorney.

He said he had gone to his house and had three thousand dollars stock in his possession, and that he was holding it to prorate among the creditors.

Q. Did Mr. Lee tell you that he had three thousand dollars of stock personally in his hands? A. Yes, sir. Q. Personally? A. Yes, sir.

The two statements disagree upon the very material point of whether Lee said that the company was holding the stock, or that he (Lee) was holding it personally.

The attorney says that the plaintiff and Rogers left the office together, and that when they got to the street, and while plaintiff was talking to another person, Lee told witness that "Rogers was bound to get something out of that stock."

Lee's statement of the matter is as follows: "Well, this was it: Mr. Lawrence came in and told me he had this stock in his possession at the time, and that, if we would publish something which would not look so bad in the paper, he would give that up to anyone we named, in case there was anybody that the stock was due to. I says: 'I cannot. I must transmit this'—and I did so. During the morning this thing came out, he said: 'Have you heard from Boston?' I says: 'I have not.' He told me to come up there—this was a day we later on found out of his crookedness—and I did so, and Mr. Lawrence said he had this stock in his possession. I asked the district attorney to seize the stock. I thought the detectives could seize that stock. I supposed that could be done. I am no lawyer. And that is ⁷²⁷ what I stated at the interview, that undoubtedly that stock would be seized and held for the good of the people. I would be the last man in the world he would give stock to, as he owed me money.

"Q. As I understand, then, you were merely repeating what Mr. Lawrence told you? A. Yes, sir.

"Q. And that is the way these parties were misled? A. That is the way they were misled about it."

There cannot be any doubt of the sincerity of all these statements, and the conclusion is inevitable that Lee was misunderstood.

Judgment set aside, and suit dismissed.

ON REHEARING.

LAND, J. It is ordered that there be judgment in favor of the Southern Fiber Company, one of the defendants, and Tennant Lee, garnishee, herein, dismissing plaintiff's suit as to them, with costs in both courts; and it is further ordered that, as thus amended, the judgment appealed from be affirmed as against Abbott W. Lawrence; and with these amendments of our decree herein the rehearing applied for is refused.

The Rule that Corporations are bound by the acts of their officers who are held out as having power to perform such acts (St. Clair v. Rutledge, 115 Wis. 583, 95 Wis. 964) applies only to those who deal in good faith with the officers, and who do not know, or are not bound to know, the limitations of their power: Kocher v. Supreme Council, 65 N. J. L. 649, 86 Am. St. Rep. 687; Wheeler v. Home Sav. etc. Bank, 188 Ill. 34, 80 Am. St. Rep. 161.

If Stock in a Corporation is Fraudulently Issued by one of its officers as security for his private debt, the corporation is not estopped to deny the validity of the stock as against the creditor to whom it is issued, where he knew that the surrender and transfer of the former certificates were prerequisites to the lawful issue of a new one, and took no steps to assure himself that there was a former certificate to be surrendered and transferred: Farrington v. South Boston R. R. Co., 120 Mass. 406, 15 Am. St. Rep. 222. For other authorities on the liability of corporations for fraudulent or unauthorized issues of stock, see the note to First Ave. Land Co. v. Parker, 87 Am. St. Rep. 853, and the subsequent case of Havens v. Bank of Tarboro, 132 N. C. 214, 95 Am. St. Rep. 627.

MATHIEU v. NORTH AMERICAN LAND AND TIMBER COMPANY.

[119 La. 896. 44 South. 721.]

CONTRACTS to Furnish Water.—If, under a contract to furnish water for irrigation, the irrigation company may itself determine as to when the water shall be furnished and in what quantities, and it is also stipulated that such company shall not be liable for failure to furnish water, when such failure is caused by a deficiency of water at its source of supply, accidents to machinery, injuries to canal, or other failures or accidents over which the company has no control, the control vested in it is accompanied by a corresponding measure of liability, and is exercised at its peril, and an allegation that, hav-

ing control of the water, such company failed to furnish it on proper demand, and that plaintiff thereby lost his crop, discloses a legal cause of action which, if sustained by proof, justifies a recovery, unless the company can by proof bring itself within one of the exceptions named in the contract exempting it from liability. (pp. 550, 551.)

CONTRACTS to Furnish Water—Notice.—If a contract to furnish water for irrigation stipulates that the irrigation company shall be entitled to written notice for a certain time before water will be required on the premises, no recovery can be had for failure to furnish water, in the absence of allegation and proof that the required notice was given, unless there is an acknowledgment on the part of the company of inability to comply with its obligations to furnish the water. (p. 552.)

McCoy & Moss, for the appellant.

Pujo, Moss & Sugar, for appellee.

see MONROE, J. Plaintiff alleges, in substance, that in the spring of 1906, he made ^{see} a verbal contract with defendant whereby the latter agreed to furnish the water needed to irrigate his rice crop, and upon the faith of which he planted his rice; that thereafter the contract was reduced to writing, at a time (May 24th) when defendant was actually furnishing water for a portion of the crop and when the whole crop was suffering for lack of water, as defendant well knew; that on June 12th he put defendant in default, by a demand, made in the presence of two witnesses; and that he thereafter made repeated demands for water, with which defendant, through its agent, acknowledged its inability to comply; that his land was well prepared, planted and fertilized; that he would have made a crop, consisting of rice of different qualities and value (the details of which are set forth), but for the failure of defendant to comply with its contract; and that, by reason of such failure, he has sustained a loss of ten thousand four hundred and ninety-two dollars and eighty-eight cents, for which he prays judgment. The written contract, annexed to the petition, reads, in part, as follows:

“Said lessor [the company] agrees to maintain a pumping plant and irrigation canals, as now located, in Calcasieu parish, during the year 1906, and to use all reasonable means to supply an amount of water, which, with the natural rainfall, will be sufficient to properly irrigate the lands described in this contract; but it is not to be held liable for any deficiency in the supply of water at English Bayou, nor for any loss or damage arising therefrom that may be caused by accidents to machinery, injuries to canal,

or other failures or accidents over which it has no control, but it shall only be bound to make all repairs necessary with reasonable dispatch. . . . The lessor shall be entitled to a written notice of not less than ten days before water will be required on the premises, such notice to be given to C. F. Spalding, . . . and shall state, as nearly as may be, the number of acres to be irrigated at that time, no land to be irrigated before June 1, 1906, nor later than September 1, 1906. It is further agreed . . . that the said lessor is not to irrigate every part of the within described land at once, but to proceed with the flooding as rapidly as possible. . . . The said lessee [plaintiff] will construct, maintain, carefully watch, and keep in the best repair and condition such levees, lead ditches, and drains as are necessary for ⁸⁹⁸ the safe and economical cultivation of rice on the land described herein, and will levee out the land planted in rice in such a manner that each levee will back water against the next levee, but not to exceed eight inches in depth in any part of the field; will build levees sufficiently strong to hold water on the crop without waste by leakage or running over the tops of the levees; will cause a careful and competent levee tender to pass over each and every levee at least once in very twenty-four hours, during flooding season; . . . that in case said lessee does fail to maintain any or all levees as herein stipulated, said lessor shall have the option to procure necessary labor, teams, and machinery to perform the work necessary to put the levees in condition described above and charge the expense to said lessee, which charges shall not exceed. . . . Said lessee agrees . . . not to allow . . . water to be wasted or used recklessly or unnecessarily. . . . It is also agreed . . . that . . . the levees are to be so located by said lessee that a depth of not over eight inches of water shall be required; . . . that no land will be watered that is not planted in rice; that no water will be furnished . . . when the land to be irrigated has water within three inches of the top of the levee at any point; and the said lessor has the right to withhold water from any land mentioned, where, in the lessor's opinion, there is not sufficient stand to warrant a crop or the levees are not sufficient to flood or hold water on the land without leakage or waste. The manner of distributing water to the land of said lessee is to rest entirely with the lessor or its agents, who are to determine the most efficient and economical distribution thereof; and it is well understood and agreed by

the said lessor and the said lessee that the lessor or its agents shall have absolute and entire control of the water supply, and are to be the sole judges as to when and how much of the same shall be furnished. . . . It is further agreed that the lessor will not furnish water to irrigate rice planted later than June 1, 1906."

Defendant predicated an exception of "no cause of action" on the proposition that, because the contract stipulates that "the manner of distributing water . . . is to rest entirely with the lessor or its agents, who are to determine the most efficient and economical distribution thereof," and further stipulates that "the lessor or its agents shall have absolute and entire control of the water supply, and are to be the sole judges as to when and how much of the same shall be furnished," the plaintiff is absolutely debarred "from bringing any action, ⁸⁹⁹ under said contract, for an alleged insufficient supply of water."

We do not so understand the matter. To the contrary, according to our interpretation of the contract, the control vested in the lessor is accompanied by a corresponding measure of liability, and is exercised at the lessor's peril. Hence the allegations that the lessor, having control of the water, failed to furnish it, on proper demand, and that plaintiff thereby lost his crop, discloses a legal cause of action, which, if sustained by proof, would entitle plaintiff to recover, unless defendant could show that such failure was caused by "deficiency in supply of water at English Bayou, . . . accidents to machinery, injuries to canal, or other failure or accidents over which it has no control."

By way of answer, defendant denies that it was ever put in default, in accordance with the contract or the law, or that it ever acknowledged its inability to comply with plaintiff's alleged demands for water. Upon the other hand, it alleges that, if there was any insufficiency in the water supply, it was caused by unavoidable accident to its machinery or injuries to its canal. Upon the trial, the court made the following ruling:

"By the Court: The court rules in this case that the plaintiff is bound by his pleadings and his contract. The contract having stipulated that, before he could require the defendant company to furnish water, he must give a written notice to defendant company, at least ten days before the water is wanted, and the plaintiff's petition failing to allege that he

ever made such a demand, in writing, the court holds that he cannot now show a putting in more for the purpose of recovering damages, but will be permitted to show, as alleged in his petition, that, upon subsequent and repeated demands, as alleged in his petition, the defendant acknowledged its inability to furnish water."

Under this ruling, the parties were confined, primarily, to the question whether defendant acknowledged its inability to supply the water demanded, and, the court having found that such acknowledgment was not established by the proof, the trial proceeded ~~no~~ no further, and the suit was dismissed, whereupon plaintiff appealed.

We find no error in the ruling complained of. The contract plainly entitled defendant to the notice, in writing, as a condition precedent to its subsequent default and liability, and it is not alleged or pretended that such notice was given. Defendant could not therefore have been put in default. Nor, do we find that there was any such acknowledgment of inability, on defendant's part, to comply with its obligation to furnish water, as to have dispensed with the notice; the testimony on that subject being inconclusive.

The judgment appealed from is, accordingly, affirmed.

A Ditch Company Carrying Water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual and bona fide consumer making seasonable application and offering proper compensation: *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

CONSOLIDATED GAS COMPANY v. MAYOR AND COMMON COUNCIL OF BALTIMORE CITY.

[105 Md. 43, 65 Atl. 628.]

TAXATION—Value of Property.—The Supreme Court cannot on appeal review or revise the amount of valuation placed upon property by tax officials. (p. 555.)

TAXATION—Easement of Gas Company—Bonded Indebtedness.—In fixing the value for purposes of taxation of the easement of a gas company in the streets of a city, it is error, whether the result is reached directly or indirectly, to treat the bonded indebtedness of the company as an asset, when the statutes provide that such indebtedness is to be valued and assessed for taxation to the owners thereof in the county where they reside. (p. 560.)

TAXATION—Methods of Assessor.—Upon Appeal from an assessment made by the appeal tax court, the members of that court may be asked what were their methods and mental processes in arriving at the valuation. (p. 561.)

TAXATION—The Inequality of an Assessment which will invalidate it must be predicated as of the valuation of property to which a common standard of valuation may be made. Hence an assessment on the easement of a gas company in the street is not rendered "unequal" by the fact that it is not in proportion to the valuation of other real property. (p. 562.)

TAXATION—Expert Testimony as to Property Values.—One who has been a student of taxation for many years, who has been called upon to value the easements of public service corporations in various cities, and who knows the character and extent of the property and operations of a gas company and what have been its earnings, is qualified to testify as an expert as to the value of the easement of the company in the streets, although he has no knowledge of the sales of real estate in the city. (p. 563.)

TAXATION—Expert Testimony of Values.—To Qualify a Person to testify as an expert concerning the value of the easement of a gas company in the streets, it is not necessary that he should be conversant with real estate values in the vicinity. (p. 564.)

TAXATION—Fixing Value of Easement of Gas Company.—The appeal tax court cannot lawfully assess the easement of a gas com-

pany in the streets of a city by estimating by the unit rule or otherwise the gross value of all the property and assets of the company and then eliminating the other classes of property and treating the residuum as the assessed value of the easement. (p. 568.)

Edgar H. Gans and W. C. Chesnut, for the appellant.

Edgar A. Poe, Sylvan H. Lauchheimer and W. C. Bruce, for the appellees.

⁴⁴ PEARCE, J. This is an appeal from an order of the Baltimore City court adjudging and ordering that an assessment of \$6,000,000 be imposed for the year 1906 on the mains and pipes of the Consolidated Gas Company of Baltimore City, in and under the streets and highways in Baltimore City, in addition to the assessments of \$1,127,075 and \$158,000 for mains and service pipes respectively, previously imposed. In the year 1904 ⁴⁵ an assessment of \$6,000,000, in addition to the then existing assessment of \$4,026,997, upon the tangible property of the company, was imposed by the appeal tax court of Baltimore City for the year 1905, in these words: "Additional assessment on mains, pipes, and other construction, located in, on or over public highways of Baltimore City, so as to include the valuation of the easement enjoyed by said company in said highways, \$6,000,000."

The validity of this assessment was before this court in the case of the Consolidated Gas Co. v. Mayor and City Council of Baltimore, reported in 101 Md. 542, 109 Am. St. Rep. 584, 61 Atl. 532, 1 L. R. A., N. S., 263, in which it was held that "the property or estate which the gas company has in the highways of Baltimore City is an easement which may be properly assessed to the company as real estate," but it was further held in that case that the assessment was irregular and invalid, first, because it appeared from the record that the appeal tax court had charged the gas company with the amount of its bonded indebtedness in ascertaining the value of its property for taxation, which under the Maryland statutes it was without authority to do; and second, because it also appeared from the record that the valuation had been imposed by an arbitrary and capricious method, instead of by the exercise of such judgment as the law contemplates shall be exercised by an assessor, and that such valuation could not be regarded as an assessment at all. After this decision the appeal tax court abated the assessment thus declared to be invalid, and after due notice to the gas com-

pany of its purpose to reassess said company for the year 1906 for its pipes, mains and structures located in the streets and highways of the city, made an abatement of \$4,565. upon 3.58 miles of three-inch mains, abandoned by the gas company since 1905, and entered a new assessment in the following words: "Additional assessment on mains and other structures attached to and located in or under the roads, ways, and highways in Baltimore City (including 22.993 miles of new mains), \$6,000,000." From this action of the appeal tax court, the gas company appealed to the Baltimore City court, which ⁴⁶ action was affirmed by said court in the order appealed from in this case.

Twenty-six exceptions were taken to the rulings upon evidence, and eleven prayers were submitted by the gas company, all of which were refused except the seventh, which was granted. The counsel of the city declined the request of the company that they should formulate and submit prayers outlining their standard of valuation of the easement in question, whereupon the gas company moved the court to require the submission of such prayers, which the court overruled, and the twenty-seventh exception was taken to the overruling of this motion and the refusal of the prayers of the gas company.

It has been decided in *Mayor v. Bonaparte*, 93 Md. 156, 48 Atl. 735, that this court cannot be required or allowed to sit as a board of review to revise the amount of the valuation placed by tax officials upon property for the purposes of taxation, and this was repeated in *Consolidated Gas Co. v. Mayor etc.*, 101 Md. 541, 109 Am. St. Rep. 584, 61 Atl. 532, 1 L. R. A., N. S., 263. We have therefore no warrant for interference in this case upon that ground, however great the apparent magnitude of the interests involved.

After a very careful reading of the record and the able briefs of counsel, we have reached the conclusion that the order of court affirming the action of the appeal tax court and imposing an assessment of \$6,000,000 for the year 1906 on the mains and service pipes of the Consolidated Gas Company of Baltimore City attached to and located in, on or under the roads, ways and highways in Baltimore City, in addition to the assessments previously imposed for mains and service pipes respectively upon said company for the year 1906, must be reversed for error in the rejection of the fourth and eighth prayers, which are as follows:

"4. The petitioner prays the court to rule as matter of law that the opinions as to the value of the mains and pipes of the gas company, including the easement therein in the streets of Baltimore City, as expressed by the witnesses Purdy and Bemis, are inadmissible, and must be disregarded by the court, as the method of calculation of the value of said mains and pipes and easement by said witnesses, is substantially the same as the method adopted by the appeal tax court in the valuation of said property for the year 1905, which method has been declared illegal by the court of appeals."

"8. The petitioner moves the court to strike from the record all expressions of opinion made by the witnesses Purdy and Bemis, in regard to the valuation of the mains and pipes of the gas company, including the easement therewith associated, on the ground:

"1. That said witnesses not having any knowledge of the value of real estate in Baltimore City were incompetent to express an opinion as to the value of said mains and pipes and easement; and

"2. Because said expressions of opinion by said witnesses were based on a method of computation of value which is not warranted by Maryland statutes in regard to taxation of the property of corporations."

It will be seen later on that the error in the rejection of the eighth prayer has to do solely with the second ground therein stated. The method pursued in the former case was condemned by this court, because under existing Maryland statutes "the appeal tax court was without authority to charge the Consolidated Gas Company with its own outstanding obligations" in ascertaining the value of its property for taxation, as it had done to the amount of \$10,050,000.

For the purpose of comparison of the methods adopted in the two cases we have reproduced them here, as they appear in the respective records.

METHOD IN FIRST CASE, AS TESTIFIED TO BY JUDGE LESER.

(See Record in first case, page 23, etc.)

Capital stock (10,700 shares at \$70)	\$ 7,500,000
Bonds (7,000,000 at \$110)	7,700,000
Certificates of indebtedness (\$1,500,000 at \$90) ...	1,350,000
Bonds (4½ per cent) \$1,1000	1,000,000
<hr/>	
Total value of assets of Gas Co.....	\$17,550,000

From this they deducted assessed valuation of real estate in Baltimore City and county allowing liberally for margins 4,300,000

Leaving residuum.....\$13,250,000

⁴⁸ From this they deducted their valuation of the personal property 1,250,000

Leaving\$12,000,000

This sum they considered represented the company's franchise derived from the state and also the easement in the streets. They therefore divided it in half, making an assessment for the easement of\$6,000,000

METHOD IN PRESENT CASE AS TESTIFIED TO BY PURDY AND BEMIS.

(See Record, pages 195, 196.)

Miles of mains and pipes, Baltimore City..... 478,492

Miles of mains and pipes, Baltimore County..... 49,201

527,693

9.33 per cent outside City. 90.67 per cent in City.

Stock issued, 107,710 shares.

Value of city real estate exclusive of mains and services\$ 2,843,418

Value of real estate outside the city..... 262,766

Value of personal estate 879,458

Total value of personal property and real estate exclusive of mains and services.....\$ 3,985,642

Divided Profits.

Interest\$ 497,570

Dividends 430,840

\$ 928,410

Total value of company's property 1905.....\$ 928,410

Capitalized at 5 per cent..... 18,568,200

Real estate and personal property exclusive of mains and services 3,985,642

Total mains, services and easement.....\$14,582,558

Deduct 9.33 per cent for proportion outside city 1,360,552

Value mains, services and easement in city.....\$13,222,006
Former assessment of mains, services... 1,285,035

Increase\$11,936,971

To ascertain the assessed value after the assessment is increased and a tax levied on new assessed value, the present value must be diminished by such an amount that the assessed value will coincide with market value when subject to the increased tax.

When the divided profits are capitalized at 5 per cent and the tax rate is 2.235 the increase in the assessed value must be reduced to 69.1 per cent of the present value.

Increased value above former assessment..... 11,936,971
69.1 per cent of above increase in the true increase
of assessment8,248,446.9
Former assessed value of mains and services..... 1,285,035

True assessed value of mains, services and easement 9,533,481

⁴⁹ In the first case the stock and certificates of indebtedness were reckoned at their respective market values and the resulting aggregate was \$17,550,000 as the total value of the assets of the gas company. In the present case, Mr. Purdy explained in his testimony in detail how he and Mr. Bemis arrived at their valuation. He ascertained first from the company's report to the state tax commissioner, and from the agreed statement of facts filed in the case, the interest paid on the bonded indebtedness, and the dividends paid to the stockholders, for the year 1905, which he designated divided profits. He then capitalized that aggregate at five per cent, a rate he testified to be a conservative rate for the cities of the eastern seaboard, and thus found the total value of the company's property to be \$18,568,200. From that he deducted the assessed value of the company's real estate and personal property, exclusive of the mains, services and easement, as also 9.33 per cent of all the mains and services, that being the proportion of mains and services outside of the city lim-

its. He further deducted the former assessment of mains and services, and thus found an increased value of \$11,936,971 by reason of said easement. He then further reduced this amount by an allowance for the diminution of the value of the total property by reason of the tax upon the assessment, this allowance being an amount equal to the capitalized value of that tax, capitalized at five per cent, the rate of tax for 1905 being 2.235 in the hundred dollars. This required the reduction of the increased value of the total mains and services and easement to 69.1 per cent of that value, making the true increase \$8,248,446, and adding the former assessed value of mains, and services, \$1,285,035, he concludes the true value of mains and services and easements to be \$9,533,481.

Without at all analyzing this method, its result is so strikingly close to that reached in the former case, as respects the total value of the company's property as to be most significant ⁵⁰ in itself. But when analyzed, the substantial identity of the two methods at once becomes apparent. In the present case the bonds and stock do not appear *eo nomine*, but the interest paid on these same bonds, and the dividends paid on the same stock, do appear. The rate of dividend for 1905 was four per cent, and the rate of interest paid on the total bonded indebtedness was about 4.95 per cent. Messrs. Purdy and Bemis assumed that something was laid aside for emergencies before making the four per cent dividend. Their method of calculation therefore essentially and necessarily involves the value of these bonds. There is no substantial or actual distinction between these methods as respects the dealing with the bonded indebtedness of the company, whether the amount of the bonded indebtedness is ascertained directly from the statement of the company by reference to the corpus of this indebtedness as shown in that statement, or whether it is reached indirectly by a capitalizing process based upon the interest paid on the same corpus. In both, the bonded indebtedness of the company is treated as part of its assets, in contravention of the Maryland statutes which require them to be "valued and assessed for state, county and municipal taxation to the owners thereof in the county or city in which such owners may respectively reside."

Argument could not strengthen the conclusion which we think follows from a careful examination of the details of the method in this case. It may not be amiss to observe that if the capitalized value of the interest paid on this bonded

indebtedness be eliminated from the method pursued by Messrs. Purdy and Bemis, the result will be found to be strikingly close to that obtained by Mr. Caughey's method.

If the capitalized value of this bonded indebtedness be thus eliminated, the total value of the company's property would be reduced by \$9,950,000 leaving such value \$8,618,200, and if from this the same deductions be made as in their method, viz., \$6,631,229, there will remain only \$1,986,971. Reducing this to 69.1% of that ⁵¹ amount, to allow the capitalized amount of the increased tax to be imposed, we should have \$1,372,997. To this add, as they did, the former assessed value of mains and services, \$1,285,035, and we have as the true assessed value of mains, services and this easement, \$2,658,032. Mr. Caughey, in his method, took the assessed value of mains and services for the year 1904, \$1,131,640; plus the full fee value of the land occupied by the mains and services as estimated by comparison with the value of adjacent lands, \$1,396,921; making a total of \$2,528,261, and showing a difference between the results of the two methods of only about, in round numbers, \$130,000. We do not mean to say, however, that in assessing the real property of a corporation subject to mortgage, that the corporation is entitled to any credit for the mortgage debt, nor are we to be understood as approving the method of Mr. Caughey, and it will be seen hereafter that we do not regard it as the correct method, but the closeness of the results of the two methods, if the capitalized value of the interest on the bonded indebtedness of the company be eliminated from the method of Messrs. Purdy and Bemis, is so striking as to be worthy of notice.

The error in their method was in treating the bonded indebtedness of the company as an asset for the purpose of taxation, which we have said they practically did. That error was inseparably connected with their opinions as to the aggregate value of the mains and pipes, in connection with the easement in question, and their valuation, thus reached, was an indivisible quantity, and therefore these prayers should have been granted; but we are not to be understood as meaning that their opinions would have been inadmissible, and should ⁵² have been disregarded, if the result of their method of valuation had been free from the error indicated.

It will not be necessary to notice in detail all the numerous exceptions to the admission or exclusion of testimony, nor to

review in detail all the rejected prayers, but some of these must be considered. It would appear reasonable to hope that no further appeal, to this court at least, will be required in order to reach a satisfactory assessment of this easement, but as, in event of another appeal, some of the questions raised in this case might be raised again, we will consider them now.

And first, as to whether it was competent to inquire from the members of the appeal tax court themselves what were their methods and mental processes in reaching the assessment they made for the purpose of showing either that it was illegal or excessive.

The appellees have cited in their brief numerous, respectable and eminent authorities from other jurisdictions to sustain the proposition that the method of assessors in arriving at their conclusions is a matter absolutely committed to their discretion, and that the members of such a tribunal cannot be put upon the stand to testify as to the operation of their minds in doing the work intrusted to them, and many of those authorities are collected in 27 American and English Encyclopedia of Law, second edition, page 689.

After careful consideration of these authorities, however, and with due respect to the eminent courts by which they are announced, we do not think the law can be so declared in this state.

No proceeding more closely analogous to the present can be found than that employed in condemning land under the principle of eminent domain, and in such cases ever since the case of Tide Water Canal Co. v. Archer, 9 Gill & J. 479, the practice in Maryland has allowed the examination of jurors, who signed the inquisition as witnesses, on return of such inquisition for confirmation, "upon all subjects whatever relating to the controversy, as fully as any other persons who might be sworn as witnesses in the cause, that they may be examined ⁵³ as to the grounds and motives for their finding, in order to ascertain whether in coming to their conclusions they had not mistaken facts as well as the law." That case was heard only in the circuit court for Hartford county, there being no appeal to this court from such a proceeding, but the opinion there delivered was deemed worthy of full publication in 9 Gill & J., and the case has been at last twice cited in the Maryland Reports—in 10 Md. 87 and in 44 Md. 607—and has ever since controlled our practice.

In the opinion referred to the court considered the question at length (pages 487 to 493), and explained very clearly and satisfactorily the difference which exists between a body of men proceeding under a law of that kind, and a common-law jury and the reasons which permit and require the examination as witnesses of members of a jury making such an inquisition, while it forbids the examination as witnesses of the members of a common-law jury; but it is unnecessary to recite those reasons here. It is sufficient to say that they apply in their full force to the case we are now considering. Moreover, section 170 of the new charter of Baltimore City, which provides for an appeal to the Baltimore City court from any assessment made by the appeal tax court, gives the city court full power "to require the judges of the appeal tax court, their clerks, surveyors or other agents or servants to attend, and may examine them on oath or affirmation," and it is a reasonable presumption that the reasons which induced the enactment of that provision were substantially those which led to the rule declared in *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479. For these reasons we think there was error in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and thirteenth exceptions, which constitute one group raising the question we have just considered. The next question is raised by the eleventh, twelfth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth exceptions, in all of which it was sought to show the assessment was unequal, in that it was made by a higher proportion of valuation than on other real and personal property on the same tax-roll by the same officials.

⁵⁴ As to these it will be sufficient to say that the inequality must be predicated as of the valuation of property to which a common standard of valuation may be applied, and no intelligent or fair comparison can be made between the value of ordinary parcels of land and the improvements thereon, and a mere easement to lay mains and pipes in the bed of a public street for the distribution of gas. The remaining eight exceptions relate to the competency and qualifications of Messrs. Purdy and Bemis as experts in this case, the objections being both general and special.

Mr. Purdy is a lawyer and secretary of the New York Tax Reform Association. He testified that he had been a student of taxation for twenty years; that he had made a comparative study of the tax laws of the various states in this coun-

try, and of the principal countries of Europe, and of the application of the principles of these laws to the assessment of real property in all its forms; that he had been called on to value the easements of public service corporations in various cities; that he knew the character and extent of the operations of the Consolidated Gas Company, and the mileage and size of its mains and pipes, and that he had ascertained from the statement of facts filed in this case, and from the report of the gas company to the state tax commissioner what were its earnings and its divided profits for the years 1904 and 1905.

Mr. Bemis is president of the Water Works of Cleveland, Ohio. He has devoted ten years to questions of assessment and taxation; has been employed for five years by the city of Cleveland in investigating the assessment of public service corporations embracing gas, electric light, and street railway companies, and has been called on to value the easements of gas companies in Ohio and elsewhere; and he states he had substantially the same information possessed by Mr. Purdy of the property, earnings and divided profits of this gas company for the years 1904 and 1905.

From this statement it cannot be doubted that they are generally qualified as experts upon the subject of inquiry in this case. "An expert is one possessing, in regard to a particular ⁵⁵ subject or department of human activity, knowledge not acquired by an ordinary person. This knowledge may be derived from experience or from study and direct mental application": 12 Am. & Eng. Ency. of Law, 425. "It is not ground for excluding the evidence that the witness bases his statements, in whole or in part, upon his reading": 17 Cyc. 39. "The general rule seems to be where a witness exhibits such a degree of knowledge gained from experience, observation, standard books, or other reliable sources as to make it appear that his opinion is of some value, that he is entitled to testify, it being left to the trial court to say when such knowledge is shown, and to the jury to say what the opinion is worth": 5 Encyclopedia of Evidence, 533.

This court has said in *Davis v. State*, 38 Md. 15: "In the trial of cases it often happens that questions arise touching the matter of inquiry quite out of the observation and experience of persons in general but within the observation of others, who from previous study or pursuits, or experience in life, have frequently or habitually brought that class of questions

under their observation, and hence it is, that in such cases persons who, from study or experience, have acquired a peculiar knowledge in regard thereto, are permitted to testify not only as to facts, but also to give their opinion based upon facts within their own knowledge, or upon facts proved by other witnesses." Authorities to the same effect are numerous, but there is no occasion to cite them.

It appeared that neither of these witnesses had ever bought or sold land in the city of Baltimore, nor had any personal knowledge of any sales of real estate there, and it was then specially objected that they were not qualified to value this easement as real estate, but this objection was overruled. The value of this easement, however, does not depend upon whether it is classed as real or personal property. Its actual value would be the same in either case, and we could not hesitate to sustain their qualification in this respect, even if the question was a new one. But it is not a new question. In *Sanitary District v. Pittsburgh etc. R. R. Co.*, 216 Ill. 575, 75 N. E. 248, there was a proceeding ⁵⁶ to condemn land for a freight terminal. At the trial the petitioner produced witnesses who were experienced dealers in real estate in Chicago, who testified that the land had a market value by the square foot, and gave their opinion as to such value. The witnesses for the defendant did not know the market value by the square foot, or otherwise, of land in Chicago, and had not dealt in real estate in that way, but they knew the value of the property as a freight terminal and were fully qualified to give their opinions upon that subject. The court said: "It is matter of common knowledge that such property as this devoted to such a use is not bought and sold in the market, or subject to sale in that way; and that such property has no market value in a legal sense. The property being devoted to a special and particular use, the general market value of other property was not a criterion for ascertaining compensation. . . . Evidence was admitted of the extent of the business done at the terminal station, and witnesses for defendant based their estimates of the value of the whole property upon the business handled and the profits of such business. We think there was no error in admitting the evidence."

So in *Chicago & N. W. R. W. v. Chicago & E. R. R.*, 112 Ill. 589, the court said: "When the proof tends to show that the property has no market value by reason of the particular use to which it is being applied, it is error to instruct the

jury that the compensation should not be less nor more than its fair market value."

Again, in *Franklin County v. Nashville C. & St. Louis R. R.*, 12 Lea, 521, Judge Cooper said: "The value of the roadway cannot be determined by ascertaining the value of the land included in the roadway assessed at the market value of adjacent lands, and adding the value of crossties, rails and spikes The assessable value for taxation of a railroad track can only be determined by looking to the elements on which the financial condition of the company depends; its traffic as evidenced by the rolling stock and gross earnings in connection with its capital stock."

⁵⁷ Other cases to the same effect are given in the elaborate brief of the appellees, among which we may especially mention *Oregon v. Jackson*, 38 Or. 306, and *Cochrane v. Commonwealth*, 175 Mass. 299, 78 Am. St. Rep. 491, 56 N. E. 610, in which latter case the court said: "In such a case, to confine the owner to witnesses who show themselves qualified to testify by their knowledge of sales of similar property would be to deny the owner the right to prove the true value of his property." These principles indeed are fully recognized by this court in *Consolidated Gas Co. v. Mayor, etc.*, 101 Md. 541, 109 Am. St. Rep. 584, 61 Atl. 532, 12 L. R. A., N. S., 263, in which it was said to be a "self-evident proposition that the use to which a franchise permits an easement to be put is an essential element to be considered in placing a valuation on that easement for the purposes of taxation"; and that statement is further supported in *Simpson v. Hopkins*, 82 Md. 478, 33 Atl. 714, where it was said: "The true test of a taxable value is the producing value to the owner," and nothing that was said in 101 Md. in discussing *Simpson v. Hopkins*, in any manner impairs or qualifies that declaration.

Without this easement the plant of this company would be comparatively of little value. If destroyed, it could be replaced by new buildings and machinery at cost of construction, and if additional real estate were required for operations upon a larger scale it could be acquired upon the basis of value of adjacent lands. But without the right to lay mains and pipes in the streets, and to flow gas through them for distribution to customers whose houses are all on these streets, and can only be conveniently served through the beds of these streets, the exclusive right to carry on the gas business in Baltimore City would offer far less attraction to manufac-

turers of gas. The taxable value of this easement fixed by any rational and conservative standard would shrink into insignificance when compared with the cost of laying mains and pipes under the dwellings, business houses and premises of private owners.

In illustration of the peculiar value of this easement to the other property of this gas company, we may profitably reproduce a passage from the opinion of the court in *Winnipisoegee* ⁵⁸ etc. Mfg. Co. v. Gifford, 64 N. H. 337, 10 Atl. 849, where the subject under consideration was the value of a parcel of land for a reservoir for waterworks: "The entire value of a parcel of land may consist in its capacity to render other lands valuable, as if, in a desert, a single acre were found whereon artesian wells could be sunk producing sufficient water to irrigate and make fertile the whole desert. The acre would be of great value, because by means of it lands otherwise worthless could be made valuable. It could not be justly appraised without considering its effect upon them. . . . In the appraisal of a water power, as of other property, all the facts and circumstances affecting its value are competent evidence. The assessors may consider the magnitude of the power, the uses to which it is or may be applied, and the place where it is, or may be utilized; the income derived from it by way of rents or from its use by the owners, the cost of equal power derived from other sources (that is to say, its comparative economy); in short, anything which may affect the judgment of a person desiring to purchase, in determining what price he would offer."

See, also, on the same subject, *Flax Water Pond Co. v. Lynn*, 147 Mass. 31, 16 N. E. 742. It is doubtless true that, as a general rule, the value of an easement will not exceed the value of the fee, as tested by the value of adjacent lands, because, as a general rule, the purchaser of the fee could put the property to the same use as if he had bought the easement only. But if the fee in the bed of the streets were sold, it would still be subject to the right of user by the public, and the gas company could not destroy or interfere with this right of user by laying mains and pipes in the bed of the street. In such a case as in others, the easement may be of greater value than the fee estimated by the market value for ordinary uses, and must be so where the owner of the easement has a franchise to use it for a gainful purpose to which another owner could not put the fee. Any other purchaser of the

superficial area occupied by these mains and pipes could not make, sell, or distribute gas in Baltimore City while the monopoly of the gas company is ⁵⁹ continued to it. An exception to the ordinary rule in this respect was recognized in *Baltimore City v. Latrobe*, 101 Md. 632, 61 Atl. 203, where the court speaking through Judge Boyd said: "When a piece of property which is subject to an ordinary lease for a short term is taken, it may happen that although the owner of the fee is allowed full value for the property, the tenant must also be paid a large and substantial amount in addition by reason of the value of his lease."

Since the argument of this case we have been referred by the counsel of the gas company to the case of *Taylor v. Mayor of Baltimore*, 45 Md. 576, as distinctly deciding that in no event could the estimated value of an easement exceed the fee simple valuation of the land occupied, but we cannot so regard that decision. That was a proceeding for the condemnation of the use and occupation of a parcel of land in Baltimore county for the introduction of water into the city, and the conduit for that purpose was to pass through said lands at a distance below the surface, varying from eighty to one hundred and twenty feet. The inquisition provided that the conduit which was twelve feet in diameter should be without any opening to the surface, and without the right to enter upon or disturb the surface except to clear away timber on the surface and give an unobstructed view for engineering purposes during the construction of the conduit. The land owner asked the court to rule as a matter of law that the measure of damages could not be less than the fair market value of the land estimated according to the surface value. This was refused and the ruling was affirmed on appeal.

There is a wide and obvious difference between that case and the present. There, after construction of the conduit, the city had no right to enter upon and disturb the surface. The lands were agricultural land, and that use was undisturbed by the construction and maintenance of the conduit. The prospective value for building purposes was unaffected by the conduit, and under these circumstances it would have been an injustice to require the city to pay the market value estimated at the surface. Here, however, the gas company has the right ⁶⁰ to enter upon and open the surface as well for the constantly recurring necessity of repairs, as for the purpose of

reconstruction or enlargement of the system, a right of which is of very great value to the gas company and which is exercised only at great and constant inconvenience to the city and to the public. That case cannot be regarded as deciding more than that the value of the easement there in question might be less than the fee simple value of the land occupied, estimated according to the surface value. It certainly does not decide that the value of that or any other easement cannot be more than the fee value of the land occupied.

Conceding for the purpose of the argument the appellant's contention that it was within the power of the court to require the submission of prayers by the city solicitor, the granting or refusing of the appellant's motion to that effect was a matter within the discretion of the court, and therefore beyond our control. If this had been a trial before a jury, the court could, and doubtless would, if it had deemed it necessary for the guidance of the jury, have given such instructions of its own as it thought proper. Tried as it was required to be under section 170 of the city charter without the intervention of a jury, there was no necessity for such instructions, and the appellants will be presumed to have received the same measure of protection from the unexpressed views of the court as from any rulings upon prayers offered by the city solicitor, or from any formulation by the court upon its own motion of the views it entertained.

What we have said disposes of all the material questions raised by the prayers, and we do not think it necessary to notice them further.

We have thus distinctly held that the appeal tax court cannot lawfully assess the easement by estimating, by the unit rule or otherwise, the gross value of all the property and assets of every kind of the company, and then eliminating the other classes of property, and treating the residuum as the assessed value of the easement, but this does not determine how the easement should be assessed.

⁶¹ Without attempting to answer that question, which is not distinctly raised in this case, we may properly say that in any determination which may be made by the appeal tax court it will be essential to consider the nature and qualities of the thing to be assessed. This easement is real estate consisting of a right or interest in certain parcels of land the location and dimension of which are not only capable of definite ascertainment but have been so established by the testimony in this

case. We have said that because the servient land in the present case consists of beds of streets maintained at public expense, penetrating all portions of the city, and for other reasons, this easement possesses a special character and utility which may well be held to give it a value greater than the land affected by it would have for purposes of ordinary use and occupation. The market value of the servient land as mere vacant property, as determined by the market value of lands adjoining the streets, is not the only nor, in our opinion, the chief element of value to be taken into consideration in assessing this particular easement in the public streets of the city. Its special character and apparent necessity to the successful operation of the appellants' plant makes it difficult to suggest a strictly comparative standard of valuation, and perhaps no such standard may have been established, but some light may be thrown upon the subject by an inquiry into the terms upon which other instrumentalities of a somewhat similar nature are permitted to be located and maintained under the beds of the streets. It is a matter of common knowledge that in the city of Baltimore, as in other municipalities, easements are granted for laying and maintaining under the beds of the public streets private drains and sewer pipes, and conduits for telephone, telegraph and electric light and power service, and for the distribution of steam and hot and cold air and for other purposes for such easements, charges or rentals are paid to the municipality. The testimony in the present case of J. W. Freeman, the deputy city collector, shows the charge per lineal foot at this time made by the city of Baltimore for the right to construct and maintain private drains and sewers and ⁶² vaults under the bed of its streets and alleys. Reference to the above easements is made by way of illustration only. The productive value of the use to which those easements are put is so different from that to which the easement under consideration is put, as necessary to suggest the inherent difference in their valuation for the purposes of taxation. Other considerations pertinent to the nature, qualities and productive value of this easement will doubtless suggest themselves to the official appraisers who have given time and thought to the duties of their occupation, and will aid them in arriving at a just and fair assessment of it. As was said in *Brooklyn v. New York*, 199 U. S. 48, 25 Sup. Ct. Rep. 713, 50 L. ed. 79: "All that can be required is that the assessing

power exercise an honest judgment based upon the information it possesses or can acquire."

The order sustaining the action of the appeal tax court will be reversed and the assessment of \$6,000,000 is hereby vacated.

But inasmuch as we hold said assessment to be merely irregular and not wholly void, the cause will be remanded to the Baltimore city court for further proceedings in conformity with the views herein expressed, and with the provisions of section 170 of the charter of Baltimore City.

Order reversed with costs above and below, and cause remanded.

The Taxation of the Franchises and Easements of public service corporations has recently been before the courts in the following cases: Consolidated Gas Co. v. Baltimore, 101 Md. 541, 109 Am. St. Rep. 584; People v. State Board of Tax Commrs., 174 N. Y. 417, 105 Am. St. Rep. 674; Detroit Citizens' St. Ry. Co. v. Common Council, 125 Mich. 673, 84 Am. St. Rep. 589; State v. Nevada Cent. R. R. Co., 28 Nev. 186, 113 Am. St. Rep. 834.

JOHNSON v. JOINSON.

[105 Md. 81, 65 Atl. 918.]

WILLS.—The Standard or Test of Testamentary Capacity is a matter of law to be defined by the court for the guidance of the jury in reaching a decision in a given case; whether the evidence in the case measures up to that standard is, as a general rule, a matter of fact to be decided by the jury. (p. 573.)

WILLS—Insane Delusion.—To Avoid a Will because the testator entertained a delusion, the delusion must be an insane delusion, and the will must be the product thereof. (p. 574.)

WILLS.—An Insane Delusion is a Belief in things impossible, or, though possible, so improbable under the surrounding circumstances that no man of sound mind could give them credence. (p. 574.)

WILLS—Insane Delusion as to Illegitimacy of Children.—Where a man wills his entire estate to his children of a former marriage because he believes that his present wife is unfaithful and his children by her illegitimate, which belief has no evidence to support it, the will may be avoided as the product of an insane delusion. (p. 575.)

WILL CONTEST—Competency of Widow to Testify.—In the trial of a caveat to a will filed by the widow of the testator as next friend of their minor children, she is not a party to the case and is a competent witness. (p. 577.)

WILLS—Insane Delusion—Evidence of Hostility.—To prove that a will was the product of an insane delusion on the part of the testator that his wife was unfaithful and their children illegitimate, it is competent to show that he had instituted divorce proceedings. (p. 577.)

Joshua W. Miles, H. L. D. Stanford and Toadvin & Bell,
for the appellants.

Gordon Tull, Robert Moss and Ellegood, Freeny & Wailes,
for the appellees.

⁸² BURKE, J. This appeal brings up for review certain rulings of the circuit court for Wicomico county made during the trial in that court of issues involving the validity of the last will and testament of Wilmour M. Johnson. The record presents ten exceptions for our consideration—one to the competency of Mary Johnson, the *prochein ami* of the infant caveators, seven to the admissibility of evidence, and two to the ruling of the court upon the prayers.

It appears from the record that on the thirtieth day of September, 1905, Leland J. Johnson and Oliver C. Johnson, infant children of Wilmour M. Johnson, by their mother and next friend, filed in the orphans' court for Somerset county a caveat to a paper writing which purported to be the last will of their father, who had died in the month of August, 1905, leaving surviving him a widow, Mary Johnson, and six children, four by a former marriage, and the two infant caveators, both of whom are of tender age. The alleged will was dated the 6th of December, 1904, and was admitted to probate by the orphans' court for Somerset county on the eighth day of August, 1905. By it the whole estate of the testator was devised and bequeathed to the four children by his former marriage. Upon the application of the caveators, the orphans' court sent four issues to the circuit court for Somerset ⁸³ county to be tried by a jury. The first issue related to the signing and attestation of the will; the second to the knowledge and understanding by the testator of its contents at or before the time of its execution; the third to his testamentary capacity at the time of making the will; and the fourth whether its execution was procured by undue influence exercised over him. The case was first removed to the circuit court for Worcester county for trial, and subsequently, upon the suggestion and affidavit of the defendants, was sent to the circuit court for Wicomico county, to which court, upon

trial had, the jury found for the caveatees on the first, second and fourth issues, and upon the third issue, that of testamentary capacity, they found their verdict for the caveators. From the rulings of the court, which will be later considered, the caveators have prosecuted this appeal.

At the conclusion of the caveators' case, the court, at the instance of the defendants, directed a verdict in their favor upon the first, second and fourth issues. The defendants at that time also asked the court to withdraw the third issue from the consideration of the jury, upon the ground the caveators had offered no evidence legally sufficient to show that the testator at the time of the execution of the will was not of sound and disposing mind and capable of executing a valid deed or contract. This prayer was refused by the court, and this ruling constitutes the appellant's sixth exception. After the rejection of the prayer, the appellants proceeded with their case, and examined a number of witnesses. By so doing they lost the benefit of this exception: *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337. This prayer was again offered at the conclusion of the whole case, and was again refused by the court, to which ruling the appellants excepted, and this exception, together with that taken to the granting of the caveators' first and second prayers, presents the main and important questions in the case, which are, first: Does the record disclose evidence legally sufficient to have taken the case to the jury upon the issue of testamentary capacity? Was there misdirection of law in either of the two prayers granted at ⁸⁴ the instance of the caveators? In the consideration of the first question it must be borne in mind that this court has no power to review the finding of the jury upon matters of fact.

The caveatees introduced a number of witnesses who testified to the capacity of the testator to make a valid will, but the jury disregarded this evidence and we have no power to review their finding upon that question. If upon the whole record there was evidence legally sufficient to have justified the trial court in submitting the case to the jury upon the issue of mental capacity, we have no power to disturb the verdict. In the case of *Hiss v. Weik*, 78 Md. 439, 28 Atl. 400, where the court had under consideration a prayer which sought to withdraw the case from the consideration of the jury upon the ground that there was no evidence legally sufficient to show that the will in that case was procured by undue

influence, Judge McSherry in the course of his opinion used this language, which is strictly applicable to the question we are now considering: "As an appellate court we cannot review the finding of the jury upon matters of fact, nor can we pass upon the comparative weight of the conflicting evidence submitted to them. If no error of law has been committed by the inferior court in any of its rulings, the verdict of the jury, whether right or wrong, just or unjust, and even though it be directly against and in the very teeth and face of the preponderance of the evidence, cannot be interfered with here; and there is no power lodged elsewhere to set aside the verdict, except with the judge before whom the case was tried below."

We are, therefore, limited to the inquiry as to whether there is to be found in this case evidence legally sufficient to have warranted the court in submitting to the jury the question of the testamentary capacity of Wilmour M. Johnson at the time of making of the will in controversy. The proof of mental unsoundness of the testator at that time rested upon the caveators, and they were bound to establish to the satisfaction of the jury that the mind of the testator was impaired to that degree which in legal contemplation rendered his act ⁸⁵ invalid. The standard or test of testamentary capacity is a matter of law, and is to be determined or defined by the court for the guidance of the jury in reaching a decision in a given case; whether the evidence in the case measures up to that standard is, as a general rule, a matter of fact to be decided by the jury. In this case no question is made as to the general mental soundness of Wilmour M. Johnson. On the contrary, it is conceded that he was mentally sound upon all subjects, except the one upon which the validity of his will was assailed, viz., an insane delusion as to the illegitimacy of his two infant children, the caveators in this case.

The subject of delusion has been under consideration in a multitude of cases both in this country and in England, and it has been uniformly held that to avoid a will upon that ground the delusion must be an insane delusion, and that the will was the product of that delusion. If Johnson was the victim of an insane delusion at the time he made his will, there can be no doubt that the will ought to have been stricken down; because it is clear upon all the facts in the case that it was the immediate product of that delusion. It was the duty of the court to have given the jury a legal definition of an

insane delusion, and to have instructed them as to the circumstances under which it would have rendered the will invalid. This, we think, was properly done by the granting of the defendants' ninth prayer, and the plaintiff's first and second prayers. By the ninth prayer of the defendants the jury were instructed that if they believe that Wilmour M. Johnson had opinions with respect to his wife and her conduct toward him, which were extravagant and eccentric, or even unfounded, yet if the jury found that at the time he made his will he possessed the degree of capacity described in the defendants' seventh prayer, and that the provisions of his will were made by him in accordance with his own judgment and choice as to the disposition of his property, uncontrolled by any insane delusions, then their verdict should be for the defendants on the third issue; and that the meaning of insane delusion, in its legal sense is, "a belief in things impossible, or a belief in ⁸⁶ things possible, but so improbable under the surrounding circumstances, that no man of sound mind could give them credence." By the first prayer of the caveators the jury were told that if Wilmour M. Johnson labored under an insane delusion as defined in defendants' ninth prayer as to the character and fidelity of his wife, Mary Johnson, and the paternity of the said Leland J. Johnson and Olive C. Johnson, and labored under the insane delusion that the said caveators were not his children, but were the children of some one or more other persons, and that he executed the last will and testament offered in evidence under the influence and control of such delusion, and would not have so disposed of his property to the prejudice of the said Leland J. Johnson and Olive C. Johnson if his mind had been free from such delusions, then they must find for the plaintiffs on the third issue, and to prove whether such delusions were insane and of a permanent character, it is competent for the jury to take into consideration evidence of hostility, if any there was, to his wife and the said children; and by the caveators' second prayer they were instructed that if Wilmour M. Johnson labored under an insane delusion as defined in defendants' ninth prayer which affected his mind in the disposition of his property by the will in evidence, and that but for the influence of said delusion, the said will would not have been made by him, then they should find for the plaintiffs upon the third issue as to his testamentary capacity at the time of executing the will, although the jury should believe that the said Johnson

conducted his ordinary business with shrewdness and apparent discretion, and did not make any exhibition of insanity to many persons who were brought in contact with him.

These prayers announced the correct principles of law upon the only issue left for the decision of the jury. Assuming for the moment that Mrs. Johnson was a competent witness, was there evidence legally sufficient from which the jury might have found that the testator lacked testamentary capacity within the meaning of those prayers? The testimony on the part of the plaintiffs showed the marriage of Mary Johnson to ⁸⁷ the testator in 1898, and that they lived together about two years; that during that time two children, the infant plaintiffs in this case, were born to them; that for some time after his marriage, and after the birth of the first child, they lived happily together; that he was proud and fond of his wife and child; that Mrs. Johnson was a faithful and chaste wife, but that some time after her pregnancy with the second child her husband's manner and conduct toward her changed; he became abusive to her; charged her with unchastity; denied the paternity of the children; treated her with such harshness that she was obliged to leave him; that he instituted divorce proceedings against her; refused to be convinced of his wife's chastity and the legitimacy of the children; displayed toward them feelings of great hostility and aversion, and finally excluded them from all participation in his estate, solely because of his belief in his wife's unchastity and his children's illegitimacy.

If the plaintiff's evidence be true, there was absolutely nothing in the conduct of his wife to justify or warrant such a belief on his part. Such a state of facts was sufficient to have taken the case to the jury, under the prayers to which we have referred, upon the question of insane delusion. In *Bell v. Lee*, 28 Grant Ch. 50, where the question of insane delusion as to the illegitimacy of a child was under consideration, the court approved the doctrine stated by Sir James Hannen in *Broughton v. Knight*, 3 Pro. & D.: "It is unfortunately not a thing unknown to parents, and in justice to women I am bound to say that it is more frequently the case with fathers than mothers that they take unduly harsh views of the character of their children, some especially. That is not unknown. But there is a limit, beyond which one feels that it ceases to be a question of harsh, unreasonable judgment and character, and that the repulsion which a parent exhibits toward one or

more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into ^{ss} practice so as to do them injury, or deprive them of advantages which most men desire above all things to confer upon their children. I say there is a point at which such repulsion and aversion are in themselves evidence of unsoundness in mind."

The court in *Bell v. Lee*, 28 Grant Ch. 50, held that a fixed and unalterable conviction on the part of the testator that his child was illegitimate was evidence of an insane delusion, when it appeared that there was not a scintilla of evidence to support such a belief.

In *Middleditch v. Williams*, 45 N. J. Eq. 734, in which case the doctrine of *Bell v. Lee*, 28 Grant Ch. 50, was approved, the court said: "If one, without evidence of any kind, imagines or conceives something to exist which does not in fact exist, and which no reasonable person would in the absence of evidence believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory, except that they are creations of some derangement of the mind in which they originated." In the case of *American Seamen's Friendly Society v. Hopper*, 33 N. Y. 619, Denio, C. J., in the course of his opinion, said: "If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity; such a person is essentially mad or insane on those subjects, although on other subjects he may reason, act and speak like a sensible man."

In *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422, this court said: "Hostility and aversion to those who are bound to one by the ties of kindred and blood are admitted as proof upon the question of insanity, not alone because there exists such hostility, but because it is altogether without cause or based upon some delusion. The aversion of one person to another is by itself no proof of insanity; but coupled with the fact that it is without cause, or is founded upon some delusion, it may be."

⁸⁹ Upon the authority of these cases—and there are many others to the same effect—we are of opinion that, assuming the evidence offered by the plaintiff to be true, which the court must be bound to do in passing upon the defendant's fifth prayer, which sought to take the case from the jury, the question of the testator's capacity to execute the will was properly left to the jury.

We will now consider the exceptions taken to rulings upon questions of evidence, and what we have said upon the main issue in the case will dispense with any extended discussion of many of these exceptions. The first and ninth exceptions are to the competency of Mrs. Johnson as a witness, upon the ground that she is a party to the cause, and, therefore, is an incompetent witness under the act of 1904, chapter 661. Mr. Poe in his work on Practice, fourth edition, in commenting upon this act says: "Inasmuch as the object of the statute (acts 1904, chapter 661) is to remove the pre-existing disqualifications from interest in the subject and object of the suit, and to enlarge and extend, and not to restrict, the competency of persons to testify, it is not to be interpreted in such a way as to make incompetent persons who prior to its passage were competent or could have been made such." Mrs. Johnson is not a party to the case within the meaning of the evidence act. This is definitely settled in the case of *Trahern v. Colburn*, 63 Md. 99.

The second, third and fifth exceptions relate to the evidence of witnesses who were called to prove the facts to which we have referred as constituting evidence of insane delusion. There was, therefore, no error in the ruling upon those exceptions. The court was right in its ruling upon the fourth exception. It was proper to show the institution of proceedings for divorce as evidence of the testator's hostility to his wife, and there is nothing in the record to show that the provisions of the act of 1890, chapter 318 (Code 1904, art. 35, sec. 66), were not fully complied with: *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176. There was no injury done the appellants by the ruling upon the seventh exception, as the testimony sought to be ⁹⁰ introduced had been substantially put before the jury in the previous testimony evidence of the witness Brown. If it be assumed that the testimony proposed to be offered under the eighth exception would be admissible in the usual cases of contest involving testamentary capacity, in this case, where

there is no pretense that the testator was in the slightest degree influenced by the fact sought to be proven, but where it is perfectly clear that the will was the product of his belief in his wife's infidelity and in the illegitimacy of her infant children, the production of such testimony would be not only irrelevant, but would be calculated to mislead the jury. Finding no error of law in any of the rulings appealed from they will be affirmed.

Rulings affirmed and cause remanded.

Insane Delusions are discussed in the note to *People v. Hubert*, 63 Am. St. Rep. 80. An insane delusion which will destroy testamentary capacity must be such an aberration as indicates an unsound and deranged condition of the mental faculties as distinguished from the mere belief in the existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence: *Owen v. Crumbaugh*, 228 Ill. 380, 119 Am. St. Rep. 442; and it must also be relevant to the will, the occasion of its provisions or some of them: *Estate of Hemingway*, 195 Pa. 291, 78 Am. St. Rep. 815.

Aversion to Relatives as Affecting Testamentary Capacity is considered in the recent note to *McDonald v. McDonald*, 117 Am. St. Rep. 582.

JORDAN v. REYNOLDS.

[105 Md. 288, 66 Atl. 37.]

ESTATE BY ENTIRETIES.—A Judgment Against a Husband is not a lien on land held by him and his wife as tenants by the entireties. (p. 580.)

ESTATE BY ENTIRETIES.—A Husband and Wife can Convey, clear from a judgment outstanding against him, land held by them as tenants by entireties. (p. 582.)

W. C. Smith, E. A. Strauff and H. M. Emmons, for the appellant.

A. L. Jackson, for the appellees.

201 BRISCOE, J. It is admitted that the only question presented on the record 202 in this case is whether a husband and wife, holding property as tenants by the entireties, can give to a purchaser of the property a good and merchantable title, as will enable them to enforce specific performance against the purchaser, free and clear of an outstanding judgment against the husband. In other words, whether the husband's interest in case of tenancy by the entirety can be sub-

ected to the claims of his creditors during the life of the wife, and whether the right of execution is suspended during the life of the wife but enforceable on her death.

The facts are undisputed and the question arises upon a bill in equity filed by the husband and wife against the purchaser, asking for the specific performance of a contract of sale dated 16th of October, 1906, for the purchase of certain leasehold property, situate in Baltimore City, held by the husband and wife as tenants by entireties.

The defendant by his answer admits the allegations of the bill to be true, but denies the relief asked by the bill upon the ground that on the twenty-fourth day of June, 1903, a certain August Strauff obtained in the court of common pleas of Baltimore City a judgment against George A. Reynolds, one of the plaintiffs in the case, for the sum of nine hundred and fifty dollars, and this judgment is still unpaid and unsatisfied. That the judgment is a lien upon the property described in the contract of sale and that the title to the property, in consequence thereof, is not good and marketable as the contract of sale required it to be. And for this reason he refused to pay the purchase price and accept a deed.

The case was heard on bill, answer and exhibits, and from a decree requiring the defendant to comply with the contract of sale this appeal has been taken.

The character of an estate held by tenancy by entireties, similar to the one here in controversy, has been settled by numerous decisions of this court.

In *McCubbin v. Stanford*, 85 Md. 378, 60 Am. St. Rep. 329, 37 Atl. 214, where land was owned by a husband and wife as tenants by entireties and was mortgaged by the husband to secure his debts, it was held, upon ²⁹³ foreclosure proceeding, that since one tenant by entireties cannot alien the property so as to infringe the rights of the other, the mortgage by the husband could not affect the rights of his wife, and under the constitution, article 3, section 43, declaring the property of the wife shall be protected from the debts of the husband, the purchaser of the husband's interest is not entitled to possession of the property as against the wife, because her undivided entirety of interest in it would thereby be destroyed, and she would be deprived of the protection given her by the constitution.

In *Clark v. Wooten*, 63 Md. 113, where a judgment was obtained by husband and wife against a railway company, it was

held that the judgment could not be attached for a debt due by the husband, being exempt from execution in virtue of section 43 of article 3 of the constitution, which provides that the property of the wife shall be protected from the debts of the husband.

And in *Brewer v. Bowersox*, 92 Md. 567, 48 Atl. 1060, it is said after a review of the cases upon the subject: "It is not because a conveyance or gift is made to husband and wife as joint tenants that the estate by the entirety arises, but it is because a conveyance or gift is made to two persons who are husband and wife; and since in the contemplation of the common law they are but one person, they take and can only take, not by moieties, but the entirety. The marital relation, with its common-law unity of two persons in one, gives rise to this peculiar estate when a conveyance or gift is made to them without restrictive or qualifying words; and they hold as tenants by the entirety, not because they are declared to so hold, but because they are husband and wife. This estate with its incidents continues in Maryland as it existed at the common law. It differs materially from all other tenancies. The right of survivorship, which is one of its chief incidents, cannot be destroyed except by the joint act of the two; and upon the death of either the other succeeds to the entire property or fund."

Applying the principles enunciated in these cases, we cannot see how the judgment in this case can be regarded in any ²⁰⁴ legal sense as a lien upon the property in question during the life of the wife.

The law is well settled in this state that judgments create liens only because the land is made liable by statute to be seized and sold on execution. A judgment creditor stands in the place of his debtor, and he can only take the property of his debtor subject to the charges to which it was justly liable in the hands of the debtor at the time of the rendition of the judgment: *Valentine v. Seiss*, 79 Md. 187, 28 Atl. 892; *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; *Hartsock v. Russell*, 52 Md. 619.

An execution is a lien on personal property only because the personal property can be sold in satisfaction of the execution: *Eschbach v. Pitts*, 6 Md. 71; *Hanson v. Barnes' Lessee*, 3 Gill & J. 359, 22 Am. Dec. 322; *Harris v. Alcock*, 10 Gill & J. 226, 32 Am. Dec. 158.

It seems therefore to be clear both upon reason and authority that the judgment in this case is not a lien upon the property in the lifetime of the wife. There is nothing that can be seized and sold under an execution upon the judgment. Property held by this tenure cannot be sold without the joinder of the wife (*McCubbin v. Stanford*, 83 Md. 378, 60 Am. St. Rep. 329, 37 Atl. 214), and the judgment creditor can acquire no greater rights than those possessed by the judgment debtor: *Valentine v. Seiss*, 79 Md. 187, 28 Atl. 892; *Clark v. Wooten*, 63 Md. 113; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Samarzevosky v. Baltimore City Pass. Co.*, 88 Md. 479, 42 Atl. 206.

The case of *Corinth v. Emory*, 63 Vt. 505, is directly in point. In that case it was held that a husband has no interest in either the fee or the usufruct of real estate deeded to himself and wife jointly which can be taken in execution for his sole debts. In *Almond v. Bonnell*, 76 Ill. 536, it was held, where land is held by husband and wife as tenants by the entirety, as at the common law, the sale of the same on execution against the husband, followed by a sheriff's deed, will fail to pass any title whatever.

The case of *Chandler v. Cheney*, 37 Ind. 391, is an express decision on this point. The court said there can be no partition between tenants by the entireties, while such an estate exists; no interest in it can be sold on execution ²⁹⁵ for the debts of the husband or wife. From the nature of the estate and the legal relation of the parties, there must be unity of estate, unity of possession, unity of control and unity in conveying or encumbering it. A mortgage upon such an estate executed by the husband alone is void.

There is a class of cases interpreting the statutes and legislation in some of the states which hold that the husband has a right to mortgage his interest, which is a right to the use of an undivided half of the estate during the joint lives and to the fee in case he survived his wife, and by the foreclosure and sale the plaintiff acquired this interest and became a tenant in common with the wife, subject to her right of survivorship.

These cases, however, are in direct conflict with the decisions of our own state, and are against the weight of authority upon this question.

The result of a decision according to the appellant's contention would practically destroy the wife's estate and turn

her entirety into a joint tenancy or tenancy in common with the purchaser, under either a mortgage sale or a sale under an execution, on a judgment.

An insuperable objection to the position urged by the appellant here is the provision of our constitution (section 43, article 3) which declares that the property of the wife shall be protected from the debts of the husband. If the judgment creditor possesses a lien against this property, he could collect the debt by an execution, take away the wife's property without her consent, and thereby destroy the nature of the estate as it now stands.

To hold the judgment to be a lien at all against this property, and the right of execution suspended during the life of the wife, and to be enforced on the death of the wife, would, we think, likewise encumber her estate, and be in contravention of the constitutional provision heretofore mentioned, protecting the wife's property from the husband's debts.

It is clear, we think, if the judgment here is declared a lien, but suspended during the life of the wife and not enforceable ²⁰⁶ until her death, if the husband should survive the wife, it will defeat the sale here made, by the husband and wife to the purchaser, and thereby make the wife's property liable for the debts of her husband.

In *Logan v. McGill*, 8 Md. 461, it was held, in the state of the law at that date, that the act of 1841, chapter 161, does not destroy the tenancy of the curtesy, but suspends the right of execution during the life of the wife, leaving the judgment lien perfect on the life estate of the husband, to be enforced on the death of the wife. But the tenancy by the curtesy no longer exists in this state by reason of subsequent legislation, and a statutory life estate has been substituted for the common-law tenancy by the curtesy: *Snyder v. Jones*, 99 Md. 693, 59 Atl. 118.

We have been referred to no case in this state, and none can be found, where it has been held that a judgment such as the one here sought to be enforced, has been declared to be a lien upon an estate possessing the qualities and character incident to an estate by the entireties.

In *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. 40, it is said: "In an estate by the entirety the husband and wife take the same estate, the same interest, and it cannot be separated. The right of the one is the right of the other. Neither can by a separate transfer affect the rights of the other or his

own. What would defeat the interest of one would also defeat that of the other."

We therefore hold, according to the spirit and policy of our law, that the judgment creditor has no lien upon the property conveyed by the appellee to the appellant in this case.

There being no lien under the judgment, the purchaser will take a good and valid title by the joint deed of husband and wife.

The decree requiring the specific performance of the contract of sale will be affirmed.

Decree affirmed, with costs.

That Land Held by Husband and Wife as Tenants by Entireties is not liable to be sold on execution to satisfy him alone, see Mercer v. Coomler, 32 Ind. App. 533, 102 Am. St. Rep. 252; and that a mechanic's lien cannot be created against realty held by husband and wife as tenants by entireties, under a building contract signed by him alone, see Bauer v. Long, 147 Mich. 351, 118 Am. St. Rep. 552.

MURPHY v. PENNIMAN.

[105 Md. 452, 66 Atl. 282.]

RECEIVER—Suit Against Himself in Individual Capacity.—

It is not a practice to be commended for a person in his representative capacity to sue himself in his individual capacity, as where the receiver of a corporation sues the directors, one of whom is himself. But a bill is not demurrable on that ground alone. (p. 586.)

CORPORATIONS—Liability of Directors for Malfeasance.—

The directors of a corporation are personally liable in equity for the consequences of their frauds or malfeasance, or for such gross negligence as amounts to a breach of trust, to the damage of the corporation or its stockholders. (p. 586.)

CORPORATIONS—Suit Against Directors—Demurrer.—

Where the receiver of a corporation institutes a suit against the directors to hold them liable for losses due to their negligent or wrongful management of the affairs of the company, a demurrer to the whole bill will not be sustained if there is sufficient in the entire bill to require the defendants to answer, although it may contain conflicting statements and be defective in some of its parts. (p. 587.)

CORPORATIONS—Bill Against Directors—When not Multi-

farious.—A bill by the receiver of a corporation against the directors alleging that all of the defendants were connected with, or responsible for, all the acts complained of as constituting negligence and misfeasance in their management of corporate affairs, is not multifarious as joining independent matters and defendants who have no joint liability. (p. 589.)

BILL IN EQUITY—Combining Legal and Equitable Matters.—

A Demurrer to a bill on the ground that it combines matters triable

by a court of equity with matters triable at law should specify what is alleged to be triable only at law. (p. 590.)

CORPORATIONS—Duty of Directors to Attend Meetings.—While directors may be held liable for losses occurring through their habitual nonattendance at meetings of the board, still they are not required to attend every regular meeting, much less every special meeting. (p. 592.)

CORPORATIONS—Duty of Directors to Attend Meetings.—A director is not liable for what occurs at a special meeting of the board at which he was not present, unless there is evidence beyond his mere absence that connects him with the illegal acts. (p. 592.)

CORPORATIONS—Prohibited Loan, What is not.—Where directors of a corporation take from an officer his notes with collateral security for the amount of his defalcations, this does not constitute a loan to an officer in violation of a charter prohibition against such a loan. (p. 594.)

CORPORATIONS—Illegal Loans by Directors.—A Bill by the Receiver of a corporation against the directors for making illegal loans is subject to demurrer by one of the defendants who is not liable for all the loans, if it does not specify those for which he is liable. (pp. 594, 595.)

CORPORATIONS—Liability for Illegal Loans.—Where the charter of a corporation declares that directors who consent to a loan to an officer or employé are liable for the amount so loaned with the losses and expenses resulting therefrom, the "losses and expenses" can be recovered in equity, although not "the amount so loaned," independent of actual losses and expenses, as that would be a mere penalty. (p. 595.)

CORPORATIONS—Misappropriation of Funds.—An Allegation in a Bill that each and all of the directors of a corporation, with knowledge that an employé had misappropriated its funds, promoted him to a position of greater responsibility, which resulted in heavy losses to creditors and shareholders, is not open to demurrer by a defendant director. (p. 595.)

CORPORATION—Negligence of Directors—Lapse of Bond.—An allegation in a bill that each and all the directors of a corporation negligently allowed the bond of its treasurer to lapse and failed to have it renewed, whereby loss to the corporation was occasioned, requires an answer and is not open to demurrer. (p. 596.)

BANKRUPTCY—Jurisdiction of State Courts.—A Trust and Banking Company does not come within the corporations named in the national act as liable to involuntary bankruptcy proceedings, and a state court has jurisdiction to appoint a receiver for such a company under a bill alleging insolvency. (p. 597.)

BANKRUPTCY—Jurisdiction of State Court to Appoint Receiver.—The national bankruptcy act does not take away the jurisdiction of the state courts to appoint receivers of insolvent corporations, certainly not when no bankruptcy proceedings have been instituted. (p. 598.)

JOINT TORT-FEASORS—Effect of Release of One.—When some of the directors of a corporation have been guilty of misfeasance, the losses from which can be accurately ascertained, and the receiver of the company executes a release under seal to some of them, when the use of the seal is unauthorized by the court and the intention is not to discharge the other directors, the latter are not released from liability. (p. 600.)

William S. Bryan, Jr., James A. C. Bond, Francis N. Park and W. W. Parker, for the appellants.

Thomas Hughes and Clifton D. Benson, for the appellees.

⁴⁵⁵ BOYD, J. The bill of complaint was filed in this case in the name of George Dobbin Penniman and Campbell Carrington, receivers of the City Trust and Banking Company, against seventeen of the eighteen directors of that company, who were elected at the annual meeting held on January 14, 1903. The company was placed in the hands of the receivers on June 6, 1903, by an order of circuit court No. 2 of Baltimore City, on a bill filed by John A. Sheridan Company et al., which, amongst other things, alleged the insolvency of the company, which the answer admitted. The bill in this case alleges that the defendants were all of the directors of the company from the election on January 14, 1903, excepting one Frank J. Kohler, who left the state in the early part of June, 1903, and whose whereabouts is unknown to the complainants.

Thomas Hughes and Clifton Doll Benson, attorneys, were directed by the court to institute and conduct, in the name of the receivers, the legal proceedings necessary for the enforcement of the liability of the directors of the company for certain losses, and this bill, as well as another against the directors ⁴⁵⁶ elected in 1902, which will be considered in a separate opinion, was accordingly filed by them. Frank J. Murphy, one of the defendants, filed two pleas, which were overruled, and William B. Thomas, another defendant, filed demurrers to the bill which were also overruled. Appeals taken by those defendants from the order overruling their pleas and demurrers, respectively, present the questions for our consideration. We will first consider that of Mr. Thomas. There are twelve causes for the demurrers assigned, some of which can be considered together.

1. It will be well to first consider the cause assigned which numbered two. It is that Campbell Carrington is both a party plaintiff and a party defendant, and that his position as defendant is wholly antagonistic, inconsistent and irreconcilable with his position as plaintiff. Mr. Carrington was one of the directors of the company and was also one of the receivers. It is not a practice to be commended to have a person in his representative capacity sue himself as an individual, especially under such circumstances as this bill dis-

closes. It would generally be better for a receiver so situated to resign, or in case he declined to do that, for the court to remove him and appoint another, if necessary. For even if a suit be brought in the name of the corporation, the receiver has such control over its books, papers, effects, etc., as to make it very undesirable to continue in that control when a suit, particularly of this character, is being carried on against him. But in this case the court having jurisdiction of the trust authorized and directed Messrs. Hughes and Benson to institute and conduct the proceedings in the name of the receivers, and hence although the receivers are the technical plaintiffs of record, the solicitors in reality have control over the case. Any interference or obstruction placed in the way of the solicitors by the receivers, or either of them, could be reported to and corrected by the court having jurisdiction over them, and hence the reason for the rule prohibiting, or at least disapproving of, the same individual being on both sides of the record, does not have the same force as it ordinarily would. ⁴⁵⁷ Of course, we do not mean to intimate that either of these receivers have acted, or would act, improperly about the suit, as there is no such suggestion in the record, but we are speaking of what might happen under such conditions. While the practice of a person appearing on both sides of the record was condemned in *Owens v. Crow*, 62 Md. 491, it was referred to as one "which has to some extent prevailed," and neither in that case nor in those of *Stein v. Stein*, 80 Md. 306, 30 Atl. 703, and *Loney v. Loney*, 86 Md. 652, 38 Atl. 1071, did this court refuse to consider the questions involved by reason of such practice. Of course such a suit at law would present another question (*Grahame v. Harris*, 5 Gill & J. 489), but in a court of equity, "where the court can determine the respective rights of the parties without much regard to whether they appear as plaintiffs or defendants" (15 Ency. of Pl. & Pr. 482), the rule is not of such importance as to require the court in all cases to dismiss a bill, or sustain a demurrer to it because such practice has been followed. The other defendants cannot be injured, and we do not deem this a sufficient cause for the demurrer under the circumstances of this case.

2. The first, third and fourth causes assigned are to the whole bill, and may be considered together. They allege that the bill does not state a case which entitles the plaintiffs to such discovery or relief as is sought against this defendant;

that it is vague, indefinite, ambiguous, uncertain and argumentative, and does not state with sufficient certainty any fact which would give the plaintiffs cause of complaint against him.

There is no longer any question in this state about the jurisdiction of equity in cases of this character: *Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A., N. S., 738, and cases there cited. In *Booth v. Robinson*, 55 Md. 419, Alvey, J., in delivering the opinion, said that the cases "all concur in holding that, in equity, the directors are personally liable for the consequences of their frauds or malfeasance, or for some such gross negligence as may amount to a breach of trust, to the damage of the corporation or its stockholders." That principle has been repeated ⁴⁵⁸ in *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621, and *Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A., N. S., 738. There is no charge of fraud against the defendants in this bill, and with the possible exception of the charge of making loans to officers and directors, it can hardly be claimed that there is any malfeasance charged, which resulted in loss. So the question really is whether there is such negligence charged against Thomas as makes him responsible, if proven. The bill is undoubtedly very skillfully drawn, although it is difficult to avoid the impression when reading it that some of the allegations have been made in a way that may make them sufficient on demurrer, but will be very difficult to prove. The expression running through the bill of "the said directors, and each and all of them," was evidently used to meet one of the questions raised in *Fisher v. Parr*, as to whether all of the defendants were charged with the acts of negligence, etc., relied on, but the use of it in some connections would seem to be inappropriate, and to make some of the allegations uncertain, as to the meaning of the pleader. For example, in paragraph (7), division (a), the several defendants are left in great uncertainty as to whether they are charged with permitting loose conduct of the affairs of the company by being absent from meetings of the board, or by being present and taking part in them. Paragraph (8) is in direct conflict with that statement in (7) (a) which alleges "the failure of each and all of said directors to keep in touch with its management by attendance upon meetings of the board," so far as W. F. Wheatly is concerned, for it shows that he attended every meeting during the year 1903, and it

also shows that Messrs. Schulze, Pollock, Reitz, Blake and Carrington attended six out of the eight meetings—there being only five general and three special meetings that year. But while we see this and other apparently conflicting statements, the demurrers we are now considering are to the whole bill, and, under the well-established rules of equity practice, cannot be sustained, if there be sufficient in the whole bill to require the defendant to answer, although some parts of it may be defective.

If we are to be governed by the decision of *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621, ⁴⁵⁹ which we must be, it seems clear that the grounds of demurrer now under consideration, being to the whole bill, cannot be sustained. The bill alleges that the said directors, and each and all of them, “failed to perform each and every of their official duties to diligently and carefully administer the affairs of the company as they were” bound to do; that “each and all of them permitted the assets of the company to be wasted and the corporate property lost and squandered by negligence so culpable as to amount to a legal breach of trust”; that “their acts and omissions were not mere defaults or mistakes of judgment, but were inattentions to the duties of their trust and abuses of their authority”; that “they failed to do what men of ordinary caution and prudence ought to do to protect the interests of the corporations”; that they disregarded without good cause, not only the charter and by-laws of the company and general laws of the state, which prescribed the limits of their authority, but the ordinary rules and habits of business, by which even fairly prudent men are guided; and many other similar charges. But it does not stop there. It undertakes to make specific the charges of acts of negligence which are alleged to have resulted in great loss to the company. It specifies amongst other things the failure to attend meetings, failure to use due diligence in the selection of subordinate officers and agents, and to watch and scrutinize the acts and doings of the executive officers, agents and fellow directors, abuses of authority and breach of their contractual relations with the company, in wasting the assets and in making loans to officers and directors of the company, in contravention of its charter and by-laws, and alleges many other acts of omission and commission. It goes into considerable detail, and as most of the charges are covered by *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621, they cannot be reached by

demurrers to the whole bill. We are therefore of opinion that these causes are not sufficient to authorize the demurrer to be sustained.

3. The fifth, sixth and eighth grounds are that the bill combines and unites separate and distinct demands against the defendant, and improperly joins wholly independent matters; ⁴⁶⁰ that it joins the defendant with other defendants with whom he has no concern and no joint liability, as appears by the complainant's own showing. These present the question as to whether the bill is multifarious. But there can be no doubt that the bill charges the defendant with responsibility for these acts alleged. All of the defendants, according to the allegations, were directors from the election of January 14, 1903, until the receivers were appointed. The case therefore differs materially in that respect from *Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A., N. S., 738. In that case there were seventeen defendants, five of whom were directors from January 1, 1898, to December 22, 1900, when the bank closed, while the others served for different periods of that time. Some of the loans resulting in losses were not made until after some of the defendants ceased to be directors, others before some of them became such, and there were thirty separate and distinct transactions relied on. The bill failed to show that some of the defendants were in any way connected with or responsible for many of those transactions, or that others had anything to do with other acts alleged. That bill was clearly multifarious as to the defendants whose demurrers we sustained, but we overruled that of Joshua Horner on the distinct ground that he had been a director throughout the period involved in the case, from January 1, 1898, to the failure of the bank. We said: "Mr. Horner and some others were directors from the organization of the bank to the day it failed. We do not think that such of the defendants can complain by reason of there being so many different causes of action alleged in the bill, as all of them are more or less connected and related to the same general question, the negligence and misconduct of the directors in the discharge of their duties from January 1, 1898, to December 22, 1900, when the bank closed." That applies to all of these defendants (excepting in so far as hereinafter stated), and in this bill it was distinctly alleged that all of them were connected with or in some way responsible for all of the acts complained of, some by acts of commission and others of

also shows that Messrs. Schulze, Pollock, Reitz, Blake and Carrington attended six out of the eight meetings—there being only five general and three special meetings that year. But while we see this and other apparently conflicting statements, the demurrers we are now considering are to the whole bill, and, under the well-established rules of equity practice, cannot be sustained, if there be sufficient in the whole bill to require the defendant to answer, although some parts of it may be defective.

If we are to be governed by the decision of *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621, ⁴⁵⁹ which we must be, it seems clear that the grounds of demurrer now under consideration, being to the whole bill, cannot be sustained. The bill alleges that the said directors, and each and all of them, "failed to perform each and every of their official duties to diligently and carefully administer the affairs of the company as they were" bound to do; that "each and all of them permitted the assets of the company to be wasted and the corporate property lost and squandered by negligence so culpable as to amount to a legal breach of trust"; that "their acts and omissions were not mere defaults or mistakes of judgment, but were inattentions to the duties of their trust and abuses of their authority"; that "they failed to do what men of ordinary caution and prudence ought to do to protect the interests of the corporation, good cause, not on and general laws of their authority, but by which even for other similar charges takes to make specifications are alleged to have. It specifies among things, failure to subordinate officers and acts and doings of directors, abuses of relations with the ing loans to officers, ventions of its character, acts of omission in detail, and as more *Parr*, 92 Md. 245

demurrers to the whole bill. We are therefore of opinion that these causes are not sufficient to authorize the demurrer to be sustained.

3. The fifth, sixth and eighth grounds are that the bill combines and unites separate and distinct demands against the defendant, and improperly joins wholly independent matters; ⁴⁰⁰ that it joins the defendant with other defendants with whom he has no concern and no joint liability, as appears by the complainant's own showing. These present the question as to whether the bill is multifarious. But there can be no doubt that the bill charges the defendant with responsibility for these acts alleged. All of the defendants, according to the allegations, were directors from the election of January 14, 1903, until the receivers were appointed. The case therefore differs materially in that respect from *Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A., N. S., 738. In that case there were seventeen defendants, five of whom were directors from January 1, 1898, to December 22, 1900, when the bank closed, while the others served for different periods of that time. Some of the loans resulting in losses were not made until after some of the defendants ceased to be directors, others before some of them became such, and there were thirty

The bill failed in any way connect with the transactions, or acts alleged. Defendants whose names are stated that of Joshua Horner, who has been a director from January 1, 1903, to the closing of the bank. Mr. Horner and the other directors of the bank are charged with such of the damages as may be proved against so many defendants. All of them are charged with the general question of the directors in the bank from 1903, to December 22, 1903, to all of these acts (as here stated), and all of them were charged with all of the acts and others of

omission, failure to discharge the duties which they ⁴⁶¹ had assumed as directors. We therefore are of the opinion that the fifth, sixth and eighth causes assigned are insufficient to sustain the demurrer.

4. The seventh ground alleges that the bill combines matters triable and determinable by a court of equity with those triable and determinable at law. It is only necessary to say that if that be a ground for demurrer, it should specify what is alleged to be only triable and determinable at law. In short, the demurrer should have been aimed at those matters, and not at the whole bill because it contains them, although the demurrer admits that there are other matters within the jurisdiction of a court of equity.

5. The ninth ground is that in the eighteenth and nineteenth paragraphs certain matters are alleged which, if they give complainants cause of complaint, are matters of complaint against the other defendants, but not against him, nor of relief against him, and the tenth ground is that these paragraphs allege certain matters which, if they give any cause of complaint against the defendant, are triable and determinable at law and ought not to be inquired of by this court.

The eighteenth paragraph sets out section 7 of the charter of the company, which authorized it amongst other things, to deal in notes, loans and bonds, and concludes: "Provided, that no loan shall be made directly or indirectly to any officer or employé of the said corporation; and for any violation of this provision, the party or parties consenting thereto, directly or indirectly, shall be liable to said corporation for the amount so loaned and all losses or expenses that may result therefrom." The nineteenth paragraph alleges that at various and frequent times divers loans were made through the executive committee "with the sanction and approval of its board of directors, and each and every of its directors, and in direct violation of its charter and by-laws, and that all the aforesaid directors had constructive, if not actual, notice of the said loans, and are in consequence chargeable and responsible therefor." It alleges that the loans were never fully paid, but still continue as a loss to the company to the extent of \$22,378.48. It then sets out ⁴⁶² a number of loans made by the executive committee, and in each instance those of the directors present when the loans were made are stated, and it is alleged that they were ratified and approved at the next succeeding meeting of the board of directors and the

members of the board present are named. Mr. Thomas was not alleged to have been present at the board meetings excepting when one loan of \$2,500 to Pollock was ratified and approved.

Then under head of "Loans Made by the Board of Directors," it is alleged that on February 1, 1903, or thereabouts, loans were made to Frank J. Kohler, who was treasurer of the company, amounting to \$50,000, at a special meeting of the board, and those present are named. It then alleges that they were ratified and approved at the next succeeding regular meeting of the board held February 11th, and those then present are named. In neither instance was Mr. Thomas present.

Then follows a list of "Loans made by president and treasurer," and the names of those present when they were made, as well as all the directors present at subsequent meetings of the board when they were ratified and approved. Thomas was present when two of those were ratified and approved. Six loans are alleged to have been made to Cochran and Stevens amounting to \$25,400, which were indorsed by Frank J. Kohler as security and ratified and approved February 11th, when Thomas was not present. Two on February 14th to Baltimore Building and Construction Company of \$2,550 and \$5,000, and one on March 7th of \$2,550, which were indorsed by Robert H. Pollock, a director, and Frank Kohler, who was treasurer, which were approved on March 11th when Thomas was present. It is then alleged that other illegal and improper loans and investments of funds were made in violation of the charter and in disregard of their duty as directors, the particulars of which the complainants have not been able to ascertain with such certainty as to warrant them setting them forth at length, but they allege that great loss was occasioned by reason thereof.

⁴⁶³ The loans thus specified in paragraph (19) amount to \$127,400, out of which the plaintiffs only claim there is still due \$22,378.45—less than eighteen per centum of the whole. Inasmuch as the bill undertakes to give, to the very cent, the amount of alleged loss on these loans, it is difficult to understand why it did not specify the particular loans that caused that loss. It might work great hardship on Mr. Thomas, as well as other defendants, to withhold from them the knowledge that the plaintiffs must have, if they correctly state the precise sum lost and thereby require them to defend loans

amounting to \$127,400 instead of only those by which the loss is alleged to have been incurred. Such practice should not be permitted by a court of equity in a case where the liability of defendants depends not upon the provisions of a statute alone, but, so far as Mr. Thomas is concerned, merely upon his alleged negligence in not attending meetings of the board, and especially when the bill shows on its face that the plaintiffs rely on the constructive notice of the loans to such of the defendants as did not have actual notice. For that reason alone we would feel called upon to hold the nineteenth paragraph bad on demurrer, but that is by no means the only ground for so holding it.

The alleged loans of \$50,000 to Frank J. Kohler on February 1, 1903, "or thereabouts," were made at a special meeting of the board, at which, the bill shows, Thomas was not present. Conceding, as we must, under the decision in *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621, and other authorities, that directors may be liable for losses occurring through their habitual nonattendance of meetings of the board, the principle should not be carried to the extent of holding a director (especially one living at a distance from where the company's business is conducted) liable for what occurred at a special meeting, at which he was not present, unless there be some allegation (and proof when evidence is taken) to connect him with the illegal acts beyond his mere absence. We are not willing to give our approval of any doctrine that would require directors to attend every regular meeting of the board, much less ⁴⁶⁴ every special meeting. If such principle is announced as the law of this state, it will be impossible in many cases to obtain responsible persons as directors. In the city of Baltimore it is doubtless true that financial institutions have often had the benefit of the advice and aid of the most competent men in the city, for little or no compensation, although their holdings of stock were small as compared with other stockholders, but such men would hesitate to continue as directors in such institutions, if they are to be held responsible for such losses as are alleged in this paragraph, on the theory of this bill. We do not mean to intimate that directors should be free from liability simply because they were not present at a meeting of the board when some unlawful or improper act was done, which resulted in loss to the company, if it was their duty to be there, and their absence in any way caused the loss, nor do we mean to say

that there may not be cases in which the burden would be on the directors to allege and prove sufficient excuse for non-attendance, although the bill does not specifically allege the contrary, but we do say that there is nothing in this bill, as to these loans, which shows that W. B. Thomas was "consenting thereto, directly or indirectly," to use the language of the charter. Certainly his absence from a special meeting, of which it is not alleged or suggested that he had notice, which the by-laws expressly require, was not sufficient, and his mere absence from the next succeeding regular meeting (February 11th), at which it is alleged that the loans were ratified and approved, were not sufficient to show his consent, as contemplated by the charter. As the bill affirmatively shows he was not present on either occasion, there must be some allegation to show his consent, directly or indirectly, and his mere absence from the meeting, if it be assumed he had notice, cannot be fairly said to be "consenting thereto, directly or indirectly," to an act for which the statute imposes a penalty on parties so consenting.

The bill does not disclose the effect of the loans being subsequently "ratified and approved" at a regular meeting. It is not easy to see how that could have caused any loss to the ⁴⁰⁵ company, for if Kohler got \$50,000 on February 1st, the subsequent approval or disapproval of it would in all probability have been of little consequence, as Kohler already had the money, but assuming that it did in some way cause some loss, we are of the opinion that Thomas' absence from that meeting does not make him liable, under that provision of the charter, as it cannot be properly so construed. We have not thought it necessary to refer to the fact that February 11th was the first regular meeting after the organization for 1903. It would be extending the doctrine of requiring the attendance of directors very far to hold one responsible for such a statutory liability for nonattendance on that occasion.

There is another matter suggested, although not very clearly shown by the bill, with reference to this \$50,000, which would relieve the directors of any responsibility for loss on account of that sum if the facts are as they appear in the bill to be. The date and names of those present at the time of this loan are the same as those set out in paragraph (12), where it is alleged that it was agreed to accept notes of Kohler for \$78,000 with certain securities as collateral, in satisfaction

of his admitted misappropriations of the assets of the company, and that the receivers realized upon those securities a sum not exceeding \$50,000, there being a large balance still due and owing by Kohler. If the \$50,000 of loans referred to in paragraph (19) be part of those mentioned in (12), as they seem to be from what is stated in the bill, surely there can be no principle of justice or equity which would hold the directors who made that settlement responsible, under the provisions of the charter forbidding loans to officers or employes—much less any of them who were not present. They could not properly be said to be “loans” within the meaning of that section. If, as the bill alleges, Kohler had misappropriated \$78,000 of the company’s assets, can it be that the directors could not take his notes, with collateral security, for the purpose, not of making loans to him, but of securing the company? If they had the opportunity to thereby secure the company, and had neglected to do so, would not this bill have charged them with such ⁴⁶⁶ neglect? It certainly could have justly done so, unless it were shown to have been within their discretion, to determine whether or not it was best for the company. This may be illustrated by the law applicable to national banks. They cannot make loans on real estate, but it is very generally, if not universally, held that a national bank may take a mortgage on real estate to secure a loan previously made. Of course a corporation would not be permitted to evade the provisions by permitting officers to take the funds of the company and then afterward give notes to secure them, but this bill shows that Kohler appropriated the assets of the company without any authority from it or any of its officers. It alleges that he acknowledged “the defalcations” and offered to give, and it was agreed to accept, “the personal notes of the said Kohler dated February 3d and 7th, and aggregating \$78,000, with certain securities as collateral in satisfaction of his said misappropriations.” If, then, the loans of \$50,000 referred to in paragraph (19) were a part of these notes, the directors could not be held liable, under its charter, for making loans to Kohler, but they were simply doing their duty, in endeavoring to secure the company against his defalcations.

So without determining whether the alleged loans to Cochran and Stevens, indorsed by Kohler, and those to the Baltimore Building and Construction Company, indorsed by Pollock and Kohler, referred to in this paragraph could be held

to be loans within this section of the charter, as the bill gives very little information about them, they were loans of at least \$50,000 out of the \$127,400, for which the defendant could not be held, yet the bill does not show on which of the loans the losses amounting to \$22,378.45 were incurred, as it should, and the demurrer to the nineteenth paragraph should have been sustained, as presented by the nineteenth ground stated in the demurrer.

We think the tenth ground was properly overruled, as "the losses and expenses" incurred could be recovered in equity, if at all, although not "the amount so loaned," independent of actual losses and expenses, as that would be a mere penalty: *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621.

⁴⁶⁷ 6. The eleventh ground of demurrer alleges that paragraphs 11, 12, 13 and 14 do not give the complainants any cause of complaint against the defendant or of relief against him. We have already said sufficient about the \$78,000 to indicate our views on those alleged loans, but, regardless of any responsibility for them, the bill alleged in paragraph (12) that "the aforesaid settlement with the said Kohler on account of his appropriations of the funds of the company made by and with the connivance and through the procurement of the said directors, each and all of them, of the said company was only a colorable and simulated repayment of the corporate funds, and taking Kohler's notes was only a shift and device to conceal the waste of the said assets by an officer of the company, made possible by a breach of duty of its aforesaid directors in failing to use due diligence in the supervision of the company's affairs and the acts of its officers and agents." It then alleges (13) that the defendants, each and all of them, with the knowledge of the manner of squandering the assets of the company by said Kohler, continued him in actual control and management of the affairs of the company, as its treasurer, and afterward, on May 23, 1903, he was promoted to the position then created of fourth vice-president and assistant to the president, which was a position of greater responsibility than that which he had previously occupied. That in the latter position Kohler continued to act. "That the aforesaid manner of dealing by the said Kohler, made possible and acquiesced in by the said directors, each and all of them, was one of the causes of ultimately wrecking the said company and causing great loss to its creditors and stockholders." It then alleges

in (14) a large number of losses through Kohler, subsequent to the settlement with him for his previous misappropriations, which are set out in the bill. Whether or not they, or any of them, are in fact such as the defendant Thomas is responsible for can only be determined by evidence, but the allegations in the bill are sufficient to require an answer, for, if he be not liable for any of the \$78,000, the bill alleges such knowledge on his part of Kohler's conduct ⁴⁶⁸ to require an explanation of the subsequent alleged losses. This ground of demurrer (11) was therefore properly overruled.

7. The next ground (12) is that the bill by its sixteenth and seventeenth paragraphs seeks to hold the defendants liable for the amount of Kohler's bond for \$20,000, on which the United States Fidelity and Guaranty Company was security, although the bill shows on its face that it was not enforceable by the company. It is alleged in paragraph (17) that the bond expired on April 15, 1903, and that the directors, each and all of them, as a result of their negligence, in violation of their trust, in breach of their duty and with want of due care in supervising the acts of their officers and agents, failed to renew the bond as required by the by-laws, and negligently allowed it to lapse and become void. Knowledge on the part of each of the directors of the many and large misappropriations of Kohler is alleged, and it is charged that they negligently failed to make, or cause to be made, demand upon the bonding company "as they should, and as they had a right to do under the terms of the said bond," etc. Whether or not in point of fact the bond was discharged of all obligations it was liable for, by the settlement in February, can only be determined by evidence, but the bill alleges it was still liable for misappropriations of Kohler and that the defendants allowed it to lapse. There is, therefore, sufficient in this paragraph to require an answer.

Our conclusions on the demurrers are that there was error in not sustaining the one to paragraph (19), for reasons we have stated, but the others were properly overruled. Whether or not the allegations of the bill, or any of them, can be sustained can only be determined after the evidence is taken, and the case will require extraordinary care to see that no injustice is done, as there are so many defendants and so many different transactions involved, but the charges are such as to require the defendants to answer and to give the plaintiffs an opportunity to offer testimony in support of them.

8. We will now consider the pleas of Frank J. Murphy. The ⁴⁶⁹ first is to the effect that inasmuch as the receivers were appointed under a bill alleging insolvency and an answer admitting it (under sections 376 and 377 of article 23 of Code), and the national bankrupt act was in force, the court was without jurisdiction to entertain the bill and appoint receivers. The bankrupt act did not, in our opinion, in any way interfere with the action of the court. In the first place, we held in *Old Town Bank v. McCormick*, 96 Md. 341, 94 Am. St. Rep. 577, 53 Atl. 934, 60 L. R. A. 577, that the state insolvent law remained operative as to cases or classes of persons which are not provided for by the bankrupt law, and that when that law provides that a certain class of persons may apply voluntarily for its benefit, but that such class should not be adjudged involuntary bankrupts, the involuntary feature of the state insolvent law as to them remains in force, because not in conflict with the bankrupt act. By subdivision B of section 4 of the bankrupt law, as amended by act of 1903, amongst those subject to involuntary bankruptcy proceedings is "any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile business"; and the section concludes: "Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." The amendment of 1903 simply added the word "mining" to the act of 1898. Without determining whether this company would be deemed a "bank" within the meaning of that provision, it seems clear that it does not come within either of the corporations named as liable to the involuntary proceedings in bankruptcy. This act is not as broad as that of 1867 in respect to corporations: *Gould and Blakemore on Bankruptcy*, pp. 18-22; 5 Cyc. 283.

Then, in *Mowen v. Nitsch*, 103 Md. 685, 62 Atl. 582, we had occasion to refer to the act of 1896, chapter 349, now section 377 of article 23 of the code, and said that prior to that act "a corporation was not in any respect within the scope of the state insolvent laws, nor is it yet amenable to that system; but since the adoption of the act, and on the terms therein prescribed, all corporations, other than railroad companies, upon appropriate proceedings against them in a court of equity, are brought within the operation of ⁴⁷⁰ a provision of that system (but not under the system itself), in so far forth only as respects the preference of one

creditor over another when the corporation is insolvent," and while sections 376 and 377 of article 23 do refer to insolvent corporations, and the proceedings are based on their insolvency, the bankrupt act, and decisions concerning it, would have to be given great latitude to prohibit a state court from appointing receivers of a corporation, and dissolving it, even if it was one included by that act, especially when, as in this case, no proceedings in bankruptcy had been instituted against the corporation. The present bankruptcy act never contemplated prohibiting a state court from dissolving one of its own corporations which had become insolvent. Section 376 of article 23 makes no provision for setting aside preferences, and it was not until what is now section 377 was passed that our equity courts had such jurisdiction as is therein conferred on them. This case is a good illustration of the results that might follow the construction contended for. There were no proceedings against this company, within the time required by the bankrupt act, and if the state court had no jurisdiction to appoint receivers and take charge of its assets, the little that was left on June 6, 1903, might have been wasted. We are therefore of opinion that this plea was properly overruled, because the national bankrupt act had no application to this company, and if it had, it does not take away the jurisdiction of the state courts to appoint receivers to take charge of, collect and recover the assets of an insolvent corporation—certainly not when there has been no proceedings in bankruptcy against the corporation.

9. The second plea presents this question: Did the release under seal to five of the defendants by one of the receivers, after the bill was filed (the receivers being authorized by order of court to enter into settlement and compromise as set forth in a petition filed with the court), have the effect of discharging the other defendants? As Mr. Carrington, the other receiver, was also a defendant and was one of the five to be released, the petition was filed by Mr. Penniman. It in substance stated that he and his counsel were of the opinion that ⁴⁷¹ the proposed settlement of \$3,000 would be beneficial to the estate, by reason of the financial condition of those five defendants; that it was to be made on the distinct understanding that the other defendants were not to be discharged, but the plaintiffs would prosecute the suits to a decree, as if the settlement had not been made; that all claims against the five by the receivers, or by the other defendants for contribution,

should be extinguished by payment of said sum, and if it be held that the other directors have the right of contribution against them, then to the extent of such right the settlement should operate to release the other directors from the liability imposed on them by decree, and in like manner extinguish the liability of the five settled with. It concludes: "It being further understood that this agreement is to be treated as if made subsequent to such order or decree and such adjustment of liability as among the directors themselves, although the money called for by the present settlement is to be paid at once."

If the release relied on be a technical, valid release, the effect of it would seem to be well settled in this state. In *Gunther v. Lee*, 43 Md. 60, 24 Am. Rep. 504, it was said by Alvey, J., that: "All the cases, both English and American, maintain the doctrine that satisfaction from one joint tort-feasor, whether received before or after recovery, extinguishes the rights as against the others. . . . And as a consideration is always implied in a release under seal, though not expressed on its face, the release by deed of one joint trespasser will discharge all; and this has been the law from very early times." Then in that case it was further decided that: "The proviso in the release, by which the right to recover for the same injury against the other two defendants was attempted to be reserved to the plaintiffs, is simply void, as being repugnant to the legal effect and operation of the release itself." In *Berkley v. Wilson*, 87 Md. 219, 39 Atl. 502, we held that if an injured party had recovered judgment against one of several tort-feasors, which has been paid or tendered, he cannot maintain an action against another tort-feasor for the same injury. In *Abb v. Northern Pacific R. Co.*, 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 954, 58 L. R. A. 293, there is a very full and excellent note on the ⁴⁷² "effect of release of one joint tort-feasor on liability of the other," and the summary of the note is not only in accord with the principles announced in *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504, but states what is a very just rule to be adopted when the release is not under seal, and it is shown that the intention was not to discharge the other tort-feasors. We have a number of cases in this state relating to the release of one of a number of joint debtors, among the latest of which are *State v. Gott*, 44 Md. 341, *Valley Sav. Bank v. Mercer*, 97 Md. 458, 55 Atl. 435, and *Commercial Bank v. McCormick*,

97 Md. 703, 55 Atl. 439, but as appellant so contends, we will assume that this bill treats the defendants as tort-feasors, as it certainly does as to most, if not all, of the claims.

The copy of the release in the printed record has no seal after Mr. Penniman's name, but as both sides treated it at the argument as if it was under seal, we suppose it is so in the original. But it is manifest that the court never intended the receivers, or either of them, to execute a paper which would have the effect now claimed for this, and hence neither intended nor authorized the execution of a release under seal. The receivers were authorized "to enter into the settlement and compromise set forth in the foregoing agreement on the terms and conditions herein set forth," by an order written on the petition signed by Mr. Pennimore and which referred to that petition. The petition shows distinctly that the right to proceed against the other defendants was expressly reserved, and it is clear that a release under seal was not authorized or contemplated by the court. "The court itself has the care of the property, by its receiver, and that officer, being the mere creature of the court, has no power other than those conferred upon him by the court, or derived from its established practice": *Gaither v. Stockbridge*, 67 Md. 222, 9 Atl. 632, 10 Atl. 309. The order of the court in this case, in appointing the receivers, uses the same language in substance as that used in *Gaither v. Stockbridge*, 67 Md. 222, 9 Atl. 632, 10 Atl. 309. It is clear, therefore, that a release under seal (if it must be given the effect claimed by appellant) was not only not authorized, but was in effect prohibited, as the settlement was to be made on terms altogether different ⁴⁷³ from that, and hence must be treated as of no effect, as any unauthorized act of a receiver would be, unless afterward sanctioned by the court. The release under seal not being effective, there can be no reason why a court of equity should be required to give an effect to the settlement that is directly contrary to that intended, and in terms attempted to be guarded against. This is not like a case of several joint tort-feasors being sued for an injury done by them, such as a suit for assault and battery, slander, injury to the person, etc. In such case settlement by one may release the other, because if the injured party has been compensated once, he cannot be again, and especially in cases where punitive or other damages not fixed can be recovered, it would oftentimes be difficult, if not impossible, to show with any certainty that the settlement did not include all

damages sustained. But in a case such as this the losses, if any, can be accurately ascertained. For example, if the defendants are liable for losses by reason of unlawful loans, the liability being once established, the amount can be definitely fixed, and they cannot be held for damages beyond the actual losses caused by their acts of omission or commission. In this connection we might add that although it is assumed by the appellant that there can be no contribution between directors in such cases, we do not understand the authorities to be by any means settled to that effect, if there be no positive wrong involving a guilty scienter, but the wrong consists of mere negligence and inattention. While there are cases deciding that there can be no contribution, there are many excellent authorities to the contrary: See 10 Cyc. 897; 3 Am. & Eng. Dec. in Eq. 205; 5 Am. & Eng. Dec. in Eq. 426, and cases cited in them. It is not necessary to now determine that question, but we cannot admit that the weight of authority is clearly against contribution between directors, and it is undoubtedly true that in this class of cases directors are not in all respects treated as ordinary tort-feasors.

We are, then, of the opinion that the settlement made did not have the effect of wholly discharging the other defendants, but in the event of any decree against them, they must ⁴⁷⁴ be credited with such portion of the amount paid by the five directors as they may in law and under the terms of the agreement of settlement be entitled to: See *Abb v. Northern Pacific R. R. Co.*, 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 955, 58 L. R. A. 293 (summary of note). If however, it be shown to the court below that the money was paid by the five directors on the understanding by them that a release under seal was to be executed, it could consider an application of those five to have the money returned, and let the case proceed as if such an arrangement had not been entered into. Of course that should only be granted if the court be satisfied that the money was paid on the distinct understanding that the release under seal was to be given them. We think this conclusion not only in accordance with well-considered authorities, but especially applicable to a proceeding of this character. It may not be out of place to suggest that inasmuch as a settlement has been authorized to be made with those who were probably most responsible for some, if not all, of the conditions complained of in the bill, it would only be just and proper to allow a settlement with the other de-

fendants, if a reasonable one can be made, and thereby save the estate from further costs and possibly additional loss.

For reasons given we will affirm the order, in so far as it overruled the pleas of the defendant Murphy.

Order overruling demurrers and pleas affirmed, excepting in so far as it overruled the demurrer to the nineteenth (19th) paragraph of the bill, and order reversed as to that, and cause remanded for further proceedings. One-fourth of the costs in this court to be paid by Frank J. Murphy, one-fourth by William B. Thomas, and the remainder by the receivers out of the estate, the costs below abide the result of the suit.

The Statutory Liability of Directors of Corporations for misfeasance in office is considered in the recent case of *Westinghouse Electric etc. Co. v. Reed*, 194 Mass. 590, 120 Am. St. Rep. 576.

The National Bankruptcy Act supersedes state insolvency laws only so far as they conflict with it: *Old Town Bank v. McCormick*, 96 Md. 341, 94 Am. St. Rep. 577.

The Rule that the Release of One Joint Tort-feasor is the release of all (*Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146) has been materially modified in recent years, and made more just and reasonable: See the notes to *Louisville etc. Mail Co. v. Barnes*, 111 Am. St. Rep. 281; *Abb v. Northern Pac. Ry. Co.*, 92 Am. St. Rep. 872.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

TOOLAN v. LONGYEAR.

[144 Mich. 55, 107 N. W. 699.]

CONSTITUTIONAL LAW—Tax Sales—Due Process.—A statute authorizing a foreclosure of the lien of the state for unpaid taxes and a sale of the property without service of process is constitutional and valid. (p. 603.)

TAX DEEDS—Title Conveyed.—If lands are sold and bid in by the state for the nonpayment of taxes, and afterward regularly conveyed by it to a purchaser, the title conveyed is a title in fee. (p. 604.)

Cahill & Wood, for the appellants.

Thomas, Cummings & Nichols, for the appellees.

⁵⁵ **HOOKE**R, J. This case came on for trial before the court without a jury, and the court rendered judgment for the plaintiffs and the defendants have appealed. The action is ejectment, and the declaration claims the premises in fee. The defendants' title is derived from a federal patent, while that set up by the plaintiffs rests upon two auditor general's deeds for the taxes of 1891 and 1892. The lands were bid in to the state and were afterward purchased by the plaintiffs in 1895. But two assignments of error are discussed by counsel for the defendants, and we will consider those only. The questions raised are: 1. Is the tax law constitutional? 2. Did the plaintiffs acquire title in fee, through their tax deeds?

⁵⁶ It is contended that the act is unconstitutional, for the reason that it provides for the foreclosure of the lien of the state, and the sale of the property of private persons, without service of process. We have repeatedly held that this provision does not invalidate the law. Substituted service is sustained in proceedings in rem. The subject was fairly dis-

cussed in *Ball v. Ridge Copper Co.*, 118 Mich. 7, 76 N. W. 130, and this case has been approved since: See *Hooker v. Bond*, 118 Mich. 255, 76 N. W. 404. See, also, *Pritchard v. Madren*, 24 Kan. 486; *Leigh v. Green*, 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255; *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; 2 *Freeman on Judgments*, 4th ed., sec. 607. We must consider the question settled.

The second question has been discussed in several cases, but counsel urge a reconsideration on the ground of certain sections of the tax law, which are said to be inconsistent with the rule that the state acquires a title in fee to lands bid in for the state, and the further ground that what has been said in such cases is obiter. This title was acquired from the state before the passage of act of No. 229 (Pub. Acts 1897), and under section 72 of the tax law (1 Comp. Laws, sec. 3895) the title conveyed was a title in fee: See *Dawson v. Peter*, 119 Mich. 274, 77 N. W. 997; *Allen v. Cowley*, 128 Mich. 530, 87 N. W. 620; *Hickey v. Rutledge*, 136 Mich. 128, 98 N. W. 974; *Board of Supervisors of Alcona Co. v. Auditor General*, 136 Mich. 130, 98 N. W. 975; *Monaghan v. Auditor General*, 136 Mich. 247, 98 N. W. 1021; *Raber v. Hyde*, 138 Mich. 101, 101 N. W. 61; *Hoffman v. Loud & Sons' Lumber Co.*, 138 Mich. 5, 100 N. W. 1010, 104 N. W. 424.

The judgment is affirmed.

Grant, J., concurred.

McAlvay, Blair and Moore, JJ., concurred in the result.

The Principal Case was Carried by Writ of Error to the supreme court of the United States and there affirmed. It will be found reported under the title of *Longyear v. Toolan*, 28 Sup. Ct. Rep. 506. Mr. Justice Moody delivered the opinion as follows:

“This is a writ of error to the supreme court of Michigan. That court rendered judgment for the defendants in error, who were the original plaintiffs, against the plaintiff in error, who was the original defendant, in an action of ejectment to recover a certain lot of land. The defendant was at one time the owner of the land in dispute, but it was conveyed to the plaintiffs by a deed given in pursuance of a sale for taxes. The title to the land depends upon the validity of the tax title, which was upheld by the court below. The issue in this court is narrowed to the question whether the sale of the land for the enforcement and collection of the taxes, which it is conceded were duly levied, violated the due process of law guaranteed by the fourteenth amendment to the constitution of the United States.

“The method in Michigan of the assessment and collection of taxes on real property is as follows: On or before the third Monday in May the supervisor of the township makes a tax-roll, on which each parcel of real property is described, and the name of its owner, if known, set opposite. The supervisor then estimates the true cash value of the property. On the Tuesday next following the third Monday of May, the supervisor submits his assessment-roll to a board of review for correction and approval. On the fourth Monday of May and the day following the board sits, and, at the request of any tax-payer, has the power to correct the assessment on his property. The members of the board have authority to administer the oath and to examine witnesses. The assessment-roll is then finally made up and certified. The supervisor then proceeds to assess taxes in accordance with the assessment-roll, and from the first day of December following they become a lien upon the property until payment. Act 206 of the Laws of 1893 provides for the enforcement and collection of delinquent taxes by sale. All lands, the taxes upon which have remained unpaid for a year after the lands have been returned to the auditor general or the county treasurers as delinquent, are declared to be subject to sale in satisfaction of the tax lien. The law provides (section 61) that ‘as soon as practicable after the first day of June . . . the auditor general shall prepare and file in the office of the county clerk . . . a petition addressed to the circuit court for said county, in chancery, stating therein by apt reference to lists or schedules annexed thereto, a description of all lands in such county upon which taxes have remained unpaid for more than one year prior to . . . the first day of May, of the year in which the petition is filed, and the total amount of such taxes. . . . Such petition shall pray a decree in favor of the state of Michigan against said land for the payment of the several amounts so specified therein, and, in default thereof, that such lands be sold.’ The petition is then entered in ‘a substantial record-book,’ with a list of the lands and the taxes upon them. The circuit judge thereupon makes an order that the petition will be brought to hearing and decree at a time and place named, at which all persons interested who desire to contest the lien of the state may appear and file their objections; and that, in default of appearance a decree as prayed for will be entered. The petition, with the order thereon, must then be published at least once a week for four weeks next prior to the time fixed for hearing, in some newspaper published and circulating in the county, to be designated by the auditor general. If there is no such newspaper, or none can be secured, the petition and order must be printed and furnished to each voter in the county, and copies posted in three public places in each township. The foregoing publication is declared by the law to be ‘equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon, and of the sale of the lands under the decree, and shall give the court

jurisdiction' to proceed to a decree. An appeal to the supreme court may be taken by either party. On the first Monday of December following the county treasurer begins to make the sales decreed by the court, must report them to the clerk of the court, and eight days after the sales are reported to the clerk of the court are given for objections to the sale, which may be set aside as is the practice in cases of sales in equity on the foreclosure of mortgages. The sale is then confirmed, subject to a right of redemption, which may be exercised at any time within one year from the sale. The sale, however, may be set aside within one year after the owner has notice of the sale, if the taxes have been paid or the property was exempt.

"The sale in the case at bar was made after proceedings which, in all respects, conformed to the statute. The single objection made in behalf of the plaintiff in error is that the statute denies to him, then being a resident of the state, the due process of law required by the constitution, in that it substitutes notice by publication of the proceedings for sale for personal service. It has been shown that the Michigan law provides a board of review, which holds sessions on days fixed by law, where every person whose property is on the provisional assessment-roll submitted by the supervisor may be heard to correct the assessment. It would seem that this opportunity for hearing, coupled with the provision for setting aside the sale within one year after notice of it, which has been stated, satisfies the requirement of due process of law made by the fourteenth amendment, and that the state may be left to enforce the collection of the taxes as it chooses. But we pass this question without deciding it, simply observing that, in *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 16 Sup. Ct. Rep. 83, 40 L. ed. 247, it was said, that the fourteenth amendment was not violated 'if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection.' If it be assumed that the delinquent taxpayer, who has already had an opportunity to be heard upon the assessment of the tax upon his property, is entitled to further notice of the pendency of proceedings to sell the land in satisfaction of the tax lien, then the statute before us requires a sufficient notice. It is no objection that the notice was only by publication. In the case of *Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. Rep. 390, 48 L. ed. 623, a case of publication, the authorities were reviewed, and it was said (p. 92): 'Where the state seeks directly, or by authorization to others, to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are "so minded," to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the fourteenth amendment to the constitution.' Moreover, the case at bar cannot be distinguished from *Winona & St.*

P. Land Co. v. Minnesota, 159 U. S. 526, 16 Sup. Ct. Rep. 83, 40 L. ed. 247. There a statute similar to the one now before us was held to afford due process of law. The only distinction suggested is that the Minnesota statute fixed more definitely than the Michigan statute the time of filing the petition, of making the order for hearing, and of the hearing itself. But those times are fixed with sufficient certainty here. The owner of property whose taxes, duly assessed, have remained unpaid for more than one year, must be held to the knowledge that proceedings for sale are liable to be begun as soon as practicable after the first day of June, and that the law contemplates that they will be ended before December 1st, when the sales will be made by the county treasurer. The proceedings are inscribed on the public records, and otherwise made notorious. If he exercises due vigilance, he cannot fail to learn of their pendency, and that full opportunity to defend is afforded to him. This satisfies the demands of due process of law, and the judgment is affirmed."

The Legislature may Provide that the Omission to Give Notice of a tax sale does not affect the validity of the sale: Crisman v. Johnson, 13 Colo. 264, 58 Am. St. Rep. 224. See in this connection, McCord v. Sullivan, 85 Minn. 344, 89 Am. St. Rep. 561; Parish v. East Coast Cigar Co., 133 N. C. 478, 98 Am. St. Rep. 718.

ERICKSON v. LAMPI.

[150 Mich. 92, 113 N. W. 778.]

ANIMALS—Lien for Keeping—Chattel Mortgage—Priority.—

A chattel mortgage on a team of horses is superior to a lien for caring for and feeding them, unless they were actually delivered to the lien claimant for that purpose prior to the time of the filing of such mortgage. (p. 608.)

ANIMALS—Lien for Keeping—Chattel Mortgage—Priority.—

If the owner of a team of horses keeps them in the barn of another, who furnishes the feed to be fed to them on a promise that he shall be paid therefor, while the team is fed and cared for by the owner's teamster, there is no such delivery of the team to the owner of the barn to be kept and cared for as gives him a lien for stable rent and feed furnished as against a prior and duly filed chattel mortgage on the team. (p. 611.)

J. J. Patek, for the appellant.

C. Buck and Van Zile & Brownson, for the appellees.

●3 MONTGOMERY, J. This is an action of replevin brought to recover a team of horses, harness, wagon, etc. The plaintiff claims by virtue of a chattel mortgage executed

on the twenty-first day of February, 1905, and filed on the 24th of February of the same year. The amount secured by the mortgage was three hundred and forty-one dollars, and exceeded the value of the property covered. The defendants claim a lien upon the horses under the provisions of section 10746 of 3 Compiled Laws. On the trial the jury found the defendants entitled to a lien to the amount of eighty dollars, and gave judgment in the defendants' favor in that amount. A motion for a new trial was entered and refused, the reasons for denying the motion being given by the trial judge.

At the close of the testimony the plaintiff asked that a verdict be directed in his favor excluding the defendants' claim of lien. The same point was again made on the motion for a new trial, and error is assigned upon rulings adverse to the plaintiff upon this point. The theory of the judge's charge to the jury was, that unless there was an actual delivery of the team to defendant Oksa, by the owner, Lampi, to be cared for and fed, and that such delivery took place prior to the 24th of February, the plaintiff's chattel mortgage would have precedence over any claimed lien of the defendants. This was a correct view of the law: *Reynolds v. Case*, 60 Mich. 76, 26 N. W. 838; *Denison v. Shuler*, 47 Mich. 598, 41 Am. Rep. 734, 11 N. W. 402.

The court also charged the jury that if the team was delivered by the owner, Lampi, to defendant Oksa, or delivered by the teamster of Lampi under directions from the owner under an agreement that Oksa was to care for and feed the team, that this would entitle defendants to the claimed lien. It is contended in this court, as it was in the court below, that, fairly construed, the testimony ⁹⁴ on behalf of the defendants fails to show that there was in fact any such agreement. The defendant Oksa owned and occupied a barn. It was divided into two compartments, in one of which he kept his cow, and he testifies that Lampi, the owner of the team, wanted to rent the other compartment of the barn for his team of horses, and that an arrangement was made for four dollars per month, Lampi to furnish his own feed for the horses. He then testifies that soon after the team was brought there he went to Lampi and said to him that he, Oksa, could not feed his horses; that Lampi replied, "You take care of the team; I pay you—you feed the team; I pay you." He further testified that Lampi in a conversation in the presence of witness' wife said to him, "You feed the horses so and so and I settle

with you the first pay-day, when I get my first pay," and he accordingly furnished the feed until the last of January, when Lampi bought seven or eight sacks of oats and seven or eight bales of hay. That he, Oksa, furnished the feed and the teamster took care of the horses; that he came there the same time the horses did and left on the 15th of March.

On cross-examination he testified as follows:

"Q. When Lampi came up to see you, or when you went to see Lampi four days after the 15th of January, and told him that there was no feed there, didn't Lampi tell you, 'Give the teamster feed and I will pay you for it next pay-day'? A. Yes, sir. He didn't say 'Give the teamster.' He says 'You feed the team, I pay for it.' He don't mention anything about the teamster; he says 'You give the feed and I will pay for it.' He did not say I should drive the team and feed the team. The teamster was to feed my grub. In other words, he told me to give the teamster the feed and the teamster would feed it. I am sure that is what he said. And he promised he would pay me for it the next pay-day.

"Q. Then what he told you was this, 'Let the teamster have what the horses need and I will pay you for it next pay-day'? A. Yes, sir, that is what he said, and he didn't say ⁹⁵ any more; Lampi was then working the team himself. At that time I didn't ask Lampi's teamster nor tell him to drive the team for me. Lampi's teamster never had charge of the team for me. I did not tell any man, the teamster nor anybody else, to drive the team or feed the team or take care of the team for me. I didn't have anybody take care of the team for me. The teamster took care of them for Lampi until he went away. I never hired him and never asked him to take care of the team for me. Up to the time that the teamster went away the teamster was all the time the only person that held the team for Lampi. Up to the time the teamster went away nobody had charge of the team for me. I understand only feeding the team belongs to me then. When I had to furnish the feed. I fed them Sundays when the teamster was away. That was the only time that I fed the team when the teamster went away Sundays, before I took sick. I don't ask anybody about money, for the taking care of the team for the teamster those different Sundays. The only time I took care of the team was for the teamster those Sundays when he was away, before the teamster went away. I had a talk with Lampi on the 15th of January when

he rented the barn, then I had a talk with him when he said I should give the teamster hay and feed and he will pay me the next pay-day, and after that I could not remember exactly when. We had a good many more talks."

The defendant Oksa further testified as follows:

"Q. Were you to clean the horses, was that the bargain you made with Lampi? A. No, sir, all I was to do was, as I said before, furnish the feed for the horses and give it to the teamster and the teamster was to feed and take care of the horses."

The defendant Mathilda Oksa, wife of Alex, testified that soon after the horses were brought to the barn she heard a conversation with Lampi and her husband. That Lampi told her husband to take care of the team and clean them so that they got what they needed, and he would pay him the first pay-day; that this occurred at the residence of the Oksas, that she heard him state that to her husband two or three times.

It is quite obvious that the witness is either referring to ⁹⁶ some other occasion when she testifies that there was an arrangement that her husband was to clean the horses or that her testimony is so framed for the purpose of meeting the exigencies of the case. In either view, it must be held unavailing, for there was no pretense that Oksa ever did clean the horses prior to the time that the mortgage was given and filed, and it is quite clear that he never understood that he had contracted to perform any such duty.

It is argued in the brief of defendants' counsel that the so-called rent of the barn was no more than a license to occupy apartments in the building. Assuming this to be true, it gave exclusive right to the occupancy of this compartment in the barn until such license was revoked, and it could not be said that under such occupancy the possession of this team of horses was vested in the landlord or owner of the premises; and we have searched this record in vain to find the time or occasion when either actually or constructively the possession of this property was turned over from the defendant Lampi to the Oksas at any time prior to the giving and filing of this chattel mortgage. The language of the statute is that—

"Whenever any person shall deliver to any person any horse, mule, neat cattle, sheep, or swine to be kept or cared for, such other person shall have a lien thereon

. . . . for the keeping and care of such animals, and may retain possession of the same until such charges are paid": 3 Comp. Laws, sec. 10746.

There was no delivery of this property to Oksa to be kept and cared for. It did not pass from the possession of Lampi. Oksa's possession was no different than would be that of the keeper of a feed-store who had furnished feed to be fed to these horses. The owner by his agent, the teamster, continued in possession; they were kept in a stable rented, as Oksa says, to the owner, and of which for the time defendant Oksa had no control whatever. He performed no service in the care of the team except such service as he voluntarily tendered for the teamster's relief when the latter was away on Sundays. The question ⁹⁷ should not have been submitted as an open question for the jury.

The judgment will be reversed, with costs, and a new trial ordered.

McAlvay, C. J., and Carpenter, Grant and Blair, JJ., concurred.

As to the Priority Between an Agister's Lien and a chattel mortgage on the animals, see Case v. Allen, 21 Kan. 217, 30 Am. Rep. 425; Sargent v. Usher, 55 N. H. 287, 20 Am. Rep. 208. A statute declaring that "persons keeping livestock for hire shall have the same rights and remedies for the recovery of their charges therefor as innkeepers have," gives to anyone keeping livestock for compensation a lien like that of an innkeeper. In such cases it is the keeping, and not the possession alone, which gives rise to the lien: Lambert v. Nicklass, 45 W. Va. 527, 72 Am. St. Rep. 828. But independently of statute or special agreement, one who feeds or cares for the animals of another has no lien thereon for his charges: Sharp v. Johnson, 38 Or. 246, 84 Am. St. Rep. 788. See, too, Elliott v. Martin, 105 Mich. 506, 55 Am. St. Rep. 461.

INTERNATIONAL TEXT-BOOK COMPANY v. OHL

[150 Mich. 131, 111 N. W. 768.]

CONTRACTS Made on Sunday—Legality—Conflict of Laws.—

A contract executed and delivered to the agent of a foreign corporation in Michigan on Sunday is void, and cannot be enforced by such corporation organized and having its domicile in another state. (p. 613.)

CONTRACTS Made on Sunday—Legality—Conflict of Laws.—

A statute which prohibits, and makes illegal, the doing of all work except works of necessity or charity on Sunday is not merely directed against the making of contracts as such, but the mere fact that an act done on Sunday finally results in a contract made outside the state does not exempt it from the operation of the law. (p. 613.)

CONTRACTS—Validity—Conflict of Laws.—

The rule that the validity of contracts is to be determined by the law of the place where they are entered into is subject to the limitation that each state may, within constitutional limits, such as the passage of a Sunday law, determine the legality of all undertakings entered into within its own borders. (pp. 613, 614.)

CONTRACTS Made on Sunday—Estoppel.—

A person who enters into an illegal contract on Sunday is not estopped from asserting that the undertaking was entered into on that day, from the fact that it bears date as of a preceding day, when the precise facts are known to the other party to the contract. (p. 614.)

Rogers & Rogers, for the appellant.

C. R. Buchanan, F. A. Stace and D. C. Harrington, for the appellee.

132 CARPENTER, J. Plaintiff, a corporation organized under the laws of the state of Pennsylvania, brings this suit to enforce defendant's guaranty upon an alleged written contract entered into between plaintiff and defendant's son, a boy fifteen years of age. By the terms of this written contract, plaintiff agreed to furnish said son "a course of correspondence instruction for forty-eight dollars and eighty cents." Defendant guaranteed said payment. The suit was instituted in a justice's court against both defendant and his son. A judgment was there rendered in defendant's favor. Plaintiff appealed the case to the circuit court, discontinued against the son, and obtained judgment, upon a verdict directed by the court, against the father, the remaining defendant.

We are asked to reverse that judgment for several reasons. In my view of the case we need to consider but one of those reasons, viz., that the contract cannot be enforced, because

defendant's undertaking was entered into upon Sunday, and is therefore illegal. The undisputed testimony proves that defendant's son signed said contract, and defendant himself attached his guaranty thereto and delivered the same to plaintiff's agent upon Sunday. That this was the performance of an act prohibited by our law, and was therefore illegal, is clear and is settled by many decisions of this court: *Adams v. Hamell*, 2 Doug. (Mich.) 73, 43 Am. Dec. 455; *Tucker v. Mowrey*, 12 Mich. 378; *Winfield v. Dodge*, 45 Mich. 355, 40 Am. Rep. 476, 7 N. W. 906; *Brazee v. Bryant*, 50 Mich. 136, 15 N. W. 49; *Saginaw etc. R. Co. v. Chappell*, 56 Mich. 190, 22 N. W. 278; *Costello v. Ten Eyck*, 86 Mich. 348, 24 Am. St. Rep. 128, 49 N. W. 152; *Arbuckle v. Reaume*, 96 Mich. 243, 55 N. W. 808; *Aspell v. Hosbein*, 98 Mich. 117, 57 N. W. 27; *Havey v. Petrie*, 100 Mich. 190, 59 N. W. 187; *Wheeler v. Jennison*, 120 Mich. 422, 79 N. W. 643; *Pillen v. Erickson*, 125 Mich. 68, 83 N. W. 1023; *Acme Electrical Illustrating & Advertising Co. v. Van Derbeck*, 127 Mich. 341, 89 Am. St. Rep. 476, 86 N. W. 786.

¹⁸³ Plaintiff contends that these decisions and their underlying principle are inapplicable, because the contract was not made until it was accepted by plaintiff in Pennsylvania, and the contract was therefore not a Michigan contract, but a Pennsylvania contract. I think it may be conceded that the great weight of authority holds that a contract is, as a rule, considered as entered into at the place where the acceptance is made (9 Cyc., p. 670), and that the law of that place determines its legality: *John A. Tolman Co. v. Reed*, 115 Mich. 71, 72 N. W. 1104. Those decisions have no application. The Sunday law in question in this case is not one merely directed against the making of contracts as such. It prohibits and makes illegal the doing of all work except works of necessity and charity, and it makes the doing of such prohibited work punishable by a fine. The mere fact that that work finally results in a contract made outside the state does not exempt it from the operation of the law.

The principle relied upon by plaintiff, viz., that the legality of contracts is to be determined by the law of the place where they are entered into, has its limitations. It cannot make valid an act which is illegal by the laws of the state where it took place. It is subordinate to the principle that each state may, within constitutional limits—which are cer-

tainly not exceeded by passing laws against Sunday work—determine the legality of undertakings within its own borders. Plaintiff insists that defendant is estopped from asserting that its undertaking was entered into on Sunday, because it bore date as of the preceding Saturday. It is sufficient to say that this did not mislead the plaintiff, for the precise facts were known to its agent, and his knowledge was its knowledge.

Defendant's undertaking was, therefore, illegal, and a verdict should have been directed in his favor.

The judgment should be reversed, and no new trial ordered.

McAlvay, C. J., and Ostrander, Hooker and Moore, JJ., concurred.

Sunday Contracts are discussed in the note to *Henry Christian Bldg. etc. Assn. v. Walton*, 59 Am. St. Rep. 641. In many of the states such contracts are unenforceable: See *Jacobson v. Bentzler*, 127 Wis. 566, 115 Am. St. Rep. 1052; *Rickards v. Rickards*, 98 Md. 136, 103 Am. St. Rep. 393, and cases cited in the cross-reference note thereto.

The Validity of a Contract is determined by the law of the place of its performance rather than by the law of the place where it is entered into: *Swedish-American Nat. Bank v. First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549, and cases cited in the cross-reference note thereto.

SANBORN v. LOUD.

[150 Mich. 154, 113 N. W. 309.]

PATENT TO LAND to Executors.—A patent to land to "J. and N., executors of the estate of S., and to their heirs and assigns forever," conveys title to such executors individually, and not to the estate mentioned, as the words "executors of the estate of S." are merely *descriptio personae*. (p. 616.)

PATENT TO LAND to Executors—Extrinsic Evidence.—If a patent to land is issued to "J. and N., executors of the estate of S.," the court cannot, in an action of ejectment, look outside the instrument to find evidence that it was the intention of the grantees to secure the title for the estate and thereby declare the estate to be in the grantee. (p. 616.)

CONVEYANCE TO EXECUTORS—Trusts—Parties.—If land is conveyed to certain parties, "executors of the estate of S.," it cannot be declared to be held by them as trustees of such estate in a suit to which they are not parties. (p. 617.)

TRUSTS—Establishment.—The claim that title to land is held in trust is one which must be made in a court of equity. (p. 617.)

C. A. Hovey and H. L. Stevens, for the appellant.

C. R. Henry, for the appellees.

¹⁵⁵ CARPENTER, J. This is an action of ejectment. It was commenced by the plaintiff as executor and trustee to recover the possession of three descriptions of land. It was tried in the circuit court before a jury and resulted in a verdict and judgment in favor of defendants. Plaintiff seeks a reversal of that judgment upon various grounds. In my opinion, none of these grounds need be considered, because, as I shall endeavor to show, it is our ¹⁵⁶ duty to say, as a matter of law, that plaintiff did not have the legal title to the land in controversy, and defendants were, therefore, entitled to verdict and judgment.

Plaintiff claims to have acquired title by certain patents issued by the state of Michigan in the year 1871. Those patents recited the issuance of certain Agricultural College land certificates and their assignment "to John P. Sanborn, of St. Clair county, and Newell Avery, of Wayne county, executors of the estate of James W. Sanborn," and then proceeded:

"Now, therefore, I, Henry P. Baldwin, governor of said state, in consideration of the premises, and by virtue of the power and authority vested in me, . . . do issue this patent in the name and by the authority of the people of the state of Michigan, hereby granting and confirming unto the said John P. Sanborn and Newell Avery, executors aforesaid, and to their heirs and assigns forever, the following piece or parcel of land, situate in the state aforesaid, to wit: [the description is omitted]. To have and to hold the above described and granted premises unto the said John P. Sanborn and Newell Avery, executors aforesaid, and to their heirs and assigns, to their sole and proper use, benefit and behoof, forever.'

Plaintiff claims that the title thus conveyed vested in the estate of James W. Sanborn, deceased, and, therefore, that he as the present executor of said estate—he having succeeded said John P. Sanborn and Newell Avery, the executors named in the will—is entitled to recover in this suit. It is clear that he has no right to recover unless the title conveyed by said patents did vest in said estate. Did the title so conveyed vest in the estate of John W. Sanborn, of which the above-named Sanborn and Avery were executors, or

did it vest in Sanborn and Avery as individuals? If we construe this instrument by looking at the language contained within its four corners, we must say that the title was conveyed to Sanborn and Avery individually, and that the words "executors ¹⁵⁷ of the estate of James W. Sanborn" are merely *descriptio personae*. The contention that it should be construed as a grant to the estate of which they were executors requires us to cast out of the instrument the words, "their heirs and assigns forever" and to substitute in their stead, "their successors and assigns," or some equivalent expression. This we are prohibited from doing by all sound rules of construction. The words "their heirs and assigns forever" were not mere idle words. Prior to 1881 (see 3 Comp. Laws, sec. 9016), it was necessary to use the word "heirs" or some other word or words of similar import in order to create an estate of inheritance: 13 Cyc., p. 642. This reasoning is supported by numerous authorities: *Pfeiffer v. Rheinfrank*, 2 App. Div. (N. Y.) 574, 37 N. Y. Supp. 1076; *Kanenbley v. Volkenberg*, 70 App. Div. (N. Y.) 97, 75 N. Y. Supp. 8; *Innerarity v. Kennedy*, 2 Stew. (Ala.) 156; *Jackson v. Roberts*, 95 Ky. 410, 25 S. W. 879; *Richardson v. McLemore*, 60 Miss. 315; *Towar v. Hale*, 46 Barb. (N. Y.) 361; *Hannen v. Ewalt*, 18 Pa. 9. But it is contended that we may look outside of the instrument and by so looking find evidence which convinces us that it was the intention of the above-named grantees, Sanborn and Avery, to secure this title for the estate and thereby declare the estate to be the grantee. I deny our right to seek and use such evidence in construing the deed. By so doing, we permit a secret and undisclosed intent of the grantees to change the legal effect of a deed. Under that practice, deeds would no longer be construed by the court in accordance with their language. They would be construed by juries in disregard of their language.

The case of *Combs v. Brown*, 29 N. J. L. 36, is an anomalous one. There it was held that a deed much like the patents under consideration conveyed the legal title to the grantee who was therein designated "trustee," but that it might be shown in an action of ejectment in a court of law by evidence outside the deed that the grantee had taken the property in trust and that the court would presume that the trustee had, as he should do, conveyed ¹⁵⁸ the property to his executive trust. There are insuperable objections to

our applying the doctrine of that case to the case at bar. Neither John P. Sanborn nor Newell Avery are parties to this suit, and they clearly should be parties to any suit in which a court undertakes to declare that property standing in their names as individuals is held as trustees. To disregard this rule would subject defendants to a double liability for their alleged wrongful possession of the land in controversy. The claim that the title was held in trust is one which should be made in a court of equity. Under our practice, this is the proper tribunal in which to determine that question and it has authority to grant appropriate relief.

We conclude that plaintiff had no legal title to the land in controversy, and that defendants were entitled to recover.

The judgment should be affirmed.

McAlvay, C. J., and Grant, Hooker and Moore, JJ., concurred.

A Conveyance to a Named Person, Followed by the Word "Trustee," without anything further to indicate a trust, vests the legal title in him individually: See the note to *Central State Bank v. Spurlin*, 82 Am. St. Rep. 522, discussing the admissibility of extrinsic evidence in such cases to establish a trust.

PEOPLE v. BEARDSLEY.

[150 Mich. 206, 113 N. W. 1128.]

HOMICIDE—Manslaughter—Neglect of Duty.—Under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter, but the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death. (p. 620.)

HOMICIDE—Manslaughter—Neglect of Duty.—If a woman with ample experience in such affairs goes on a drunken debauch with a man not her husband, and during such debauch attempts to commit, and succeeds in committing, suicide, the doctrine of legal duty cannot be invoked to hold the man criminally liable for omitting to make an effort to save her life. (p. 624.)

A. Perry and M. F. Lillis, for the appellant.

F. M. Covert, prosecuting attorney, and C. S. Matthews, assistant prosecuting attorney, for the respondent.

²⁰⁶ McALVAY, C. J. Respondent was convicted of manslaughter before the circuit court for Oakland county, and ²⁰⁷ was sentenced to the state prison at Jackson for a minimum term of one year and a maximum term not to exceed five years. He was a married man living at Pontiac, and at the time the facts herein narrated occurred, he was working as a bartender and clerk at the Columbia Hotel. He lived with his wife in Pontiac, occupying two rooms on the ground floor of a house. Other rooms were rented to tenants, as was also one living room in the basement. His wife being temporarily absent from the city, respondent arranged with a woman named Blanche Burns, who at the time was working at another hotel, to go to his apartments with him. He had been acquainted with her for some time. They knew each other's habits and character. They had drunk liquor together, and had on two occasions been in Detroit and spent the night together in houses of assignation. On the evening of Saturday, March 18, 1905, he met her at the place where she worked, and they went together to his place of residence. They at once began to drink and continued to drink steadily, and remained together, day and night, from that time until the afternoon of the Monday following, except when respondent went to his work on Sunday afternoon. There was liquor at these rooms, and when it was all used they were served with bottles of whisky and beer by a young man who worked at the Columbia Hotel, and who also attended respondent's fires at the house. He was the only person who saw them in the house during the time they were there together. Respondent gave orders for liquor by telephone. On Monday afternoon, about 1 o'clock, the young man went to the house to see if anything was wanted. At this time he heard respondent say they must fix up the rooms, and the woman must not be found there by his wife, who was likely to return at any time. During this visit to the house the woman sent the young man to a drug-store to purchase, with money she gave him, camphor and morphine tablets. He procured both articles. There were six grains of morphine in quarter-grain tablets. She concealed ²⁰⁸ the morphine from respondent's notice, and was discovered

putting something into her mouth by him and the young man as they were returning from the other room after taking a drink of beer. She in fact was taking morphine. Respondent struck the box from her hand. Some of the tablets fell on the floor, and of these respondent crushed several with his foot. She picked up and swallowed two of them, and the young man put two of them in the spittoon. Altogether it is probable she took from three to four grains of morphine. The young man went away soon after this. Respondent called him by telephone about an hour later, and after he came to the house requested him to take the woman into the room in the basement which was occupied by a Mr. Skoba. She was in a stupor and did not rouse when spoken to. Respondent was too intoxicated to be of any assistance and the young man proceeded to take her downstairs. While doing this Skoba arrived, and together they put her in his room on the bed. Respondent requested Skoba to look after her, and let her out the back way when she waked up. Between 9 and 10 o'clock in the evening Skoba became alarmed at her condition. He at once called the city marshal and a doctor. An examination by them disclosed that she was dead.

Many errors are assigned by the respondent, who asks to have his conviction set aside. The principal assignments of error are based upon the charge of the court, and refusal to give certain requests to charge, and are upon the theory that under the undisputed evidence in the case, as claimed by the people and detailed by the people's witnesses, the respondent should have been acquitted and discharged. In the brief of the prosecutor his position is stated as follows: "It is the theory of the prosecution that the facts and circumstances attending the death of Blanche Burns in the house of respondent were such as to lay upon him a duty to care for her, and the duty to take steps for her protection, the failure to take which was sufficient to ²⁰⁹ constitute such an omission as would render him legally responsible for her death. . . . There is no claim on the part of the people that the respondent . . . was in any way an active agent in bringing about the death of Blanche Burns, but simply that he owed her a duty which he failed to perform, and that in consequence of such failure on his part she came to her death."

Upon this theory a conviction was asked and secured.

The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter: 21 Cyc., p. 770 et seq., and cases cited. This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death: 1 Bishop on Criminal Law, 6th ed., sec. 217; 2 Bishop on Criminal Law, 6th ed., sec. 695; 21 Am. & Eng. Ency. of Law, 2d ed., p. 99; 21 Cyc., p. 770 et seq.; *State v. Noakes*, 70 Vt. 247, 40 Atl. 249; 2 Wharton on Criminal Law, 7th ed., sec. 1011; Clark & Marshall on Crimes, 2d ed., p. 379 (e), and cases cited.

Although the literature upon the subject is quite meager and the cases few, nevertheless, the authorities are in harmony as to the relationship which must exist between the parties to create the duty, the omission of which establishes legal responsibility. One authority has briefly and correctly stated the rule, which the prosecution claims should be applied to the case at bar, as follows: "If a person who sustains to another the legal relation of protector, as husband to wife, parent to child, master to seaman, etc., knowing such person to be in peril of life, willfully or negligently fails to make such reasonable and proper efforts to rescue him as he might have done without jeopardizing his own life or the lives of others, he is guilty of manslaughter at least, if by reason of his omission of duty the dependent person dies.

²¹⁰ "So one who from domestic relationship, public duty, voluntary choice, or otherwise, has the custody and care of a human being, helpless either from imprisonment, infancy, sickness, age, imbecility, or other incapacity of mind or body, is bound to execute the charge with proper diligence and will be held guilty of manslaughter, if by culpable negligence he lets the helpless creature die": 21 Am. & Eng. Ency. of Law, 2d ed., p. 197, notes and cases cited.

The following brief digest of cases gives the result of our examination of American and English authorities, where the doctrine of criminal liability was involved when death resulted from an omission to perform a claimed duty. We discuss no cases where statutory provisions are involved.

In *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387, a husband was convicted of manslaughter for leaving his intoxicated wife one winter's night lying in the snow, from which exposure she died. The conviction was sustained on the ground that a legal duty rested upon him to care for and protect his wife, and that his neglect to perform that duty, resulting in her death, he was properly convicted.

State v. Smith, 65 Me. 257, is a similar case. A husband neglected to provide clothing and shelter for his insane wife. He left her in a bare room without fire during severe winter weather. Her death resulted. The charge in the indictment is predicated upon a known legal duty of the husband to furnish his wife with suitable protection.

In *State v. Behm*, 72 Iowa, 533, 34 N. W. 319, the conviction of a mother of manslaughter for exposing her infant child without protection, was affirmed upon the same ground. See, also, *Gibson v. Commonwealth*, 106 Ky. 360, 90 Am. St. Rep. 230, 50 S. W. 532.

State v. Noakes, 70 Vt. 247, 40 Atl. 249, was a prosecution and conviction of a husband and wife for manslaughter. A child of a maid servant was born under their roof. They were charged with neglecting to furnish it with proper care. In addition to announcing the principle in support of which the case is already cited, the court said:

211 "To create a criminal liability for neglect by non-feasance, the neglect must also be of a personal, legal duty, the natural and ordinary consequences of neglecting which would be dangerous to life."

In reversing the case for error in the charge—not necessary to here set forth—the court expressly stated that it did not concede that respondents were under a legal duty to care for this child because it was permitted to be born under their roof, and declined to pass upon that question. In a federal case tried in California before Mr. Justice Field of the United States supreme court, where the master of a vessel was charged with murder in omitting any effort to rescue a sailor who had fallen overboard, the learned justice in charging the jury said: "There may be in the omission to do a particular act under some circumstances, as well as in the commission of an act, such a degree of criminality as to render the offender liable to indictment for manslaughter. . . . In the first place the duty omitted must be a plain duty. . . . In the second

place it must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity, or his sense of justice or propriety": *United States v. Knowles*, 4 Saw. (U. S.) 517, Fed. Cas. No. 15,540.

The following English cases are referred to as in accord with the American cases above cited, and are cases where a clear and known legal duty existed: *Regina v. Conde*, 10 Cox C. C. 547; *Regina v. Rugg*, 12 Cox C. C. 16.

The case of *Regina v. Nicholls*, 13 Cox C. C. 75, was a prosecution of a penniless old woman, a grandmother, for neglecting to supply an infant grandchild left in her charge with sufficient food and proper care. The case was tried at assizes in Stafford before Brett, J., who said to the jury: "If a grown-up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without (at all events) wicked negligence, and ²¹² if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter."

The vital question was whether there had been any such negligence in the case designated by the trial judge as wicked negligence. The trial resulted in an acquittal. The charge of this nisi prius judge recognizes the principle that a person may voluntarily assume the care of a helpless human being, and having assumed it, will be held to be under an implied legal duty to care for and protect such person. The duty assumed being that of caretaker and protector to the exclusion of all others.

Another English case decided in the appellate court, Lord Coleridge, C. J., delivering the opinion, is *Regina v. Instan*, 17 Cox C. C. 602. An unmarried woman without means lived with and was maintained by her aged aunt. The aunt suddenly became very sick, and for ten days before her death was unable to attend to herself, to move about, or to do anything to procure assistance. Before her death no one but the prisoner had any knowledge of her condition. The prisoner continued to live in the house at the cost of the deceased and took in the food supplied by the tradespeople. The prisoner did not give food to the deceased, or give or procure any medical or nursing attendance for her; nor did she give notice to any neighbor of her condi-

tion or wants, although she had abundant opportunity and occasion to do so. In the opinion, Lord Coleridge, speaking for the court, said: "It is not correct to say that every moral obligation is a legal duty; but every legal duty is founded upon a moral obligation. In this case, as in most cases, the legal duty can be nothing else than taking upon one's self the performance of the moral obligation. There is no question whatever that it was this woman's clear duty to impart to the deceased so much of that food, which was taken into the house for both and paid for by the deceased, as was necessary to sustain her life. The deceased could not get it for herself. She could only get it through the prisoner. It was the prisoner's clear duty at common law ²¹³ to supply it to the deceased, and that duty she did not perform. Nor is there any question that the prisoner's failure to discharge her legal duty, if it did not directly cause, at any rate accelerated, the death of the deceased. There is no case directly on the point; but it would be a slur and a stigma upon our law if there could be any doubt as to the law to be derived from the principle of decided cases, if cases were necessary. There was a clear moral obligation, and a legal duty founded upon it; a duty willfully disregarded and the death was at least accelerated, if not caused, by the nonperformance of the legal duty."

The opening sentences of this opinion are so closely connected with the portion material to this discussion that they could not well be omitted. Quotation does not necessarily mean approval. We do not understand from this opinion that the court held that there was a legal duty founded solely upon a moral obligation. The court indicated that the law applied in the case was derived from the principles of decided cases. It was held that the prisoner had omitted to perform that which was a clear duty at the common law. The prisoner had wrongfully appropriated the food of the deceased and withheld it from her. She was the only other person in the house, and had assumed charge of her helpless relative. She was under a clear legal duty to give her the food she withheld, and under an implied legal duty by reason of her assumption of charge and care, within the law as stated in the case of *Regina v. Nicholls*, 13 Cox C. C. 75. These adjudicated cases and all others examined in this investigation we find are in entire harmony with the proposition first stated in this opinion.

Seeking for a proper determination of the case at bar by the application of the legal principles involved, we must eliminate from the case all consideration of mere moral obligation, and discover whether respondent was under a legal duty toward Blanche Burns at the time of her death, knowing her to be in peril of her life, which required him to make all reasonable and proper effort to ²¹⁴ save her, the omission to perform which duty would make him responsible for her death. This is the important and determining question in this case. If we hold that such legal duty rested upon respondent it must arise by implication from the facts and circumstances already recited. The record in this case discloses that the deceased was a woman past thirty years of age. She had been twice married. She was accustomed to visiting saloons and to the use of intoxicants. She previously had made assignations with this man in Detroit at least twice. There is no evidence or claim from this record that any duress, fraud, or deceit had been practiced upon her. On the contrary it appears that she went upon this carouse with respondent voluntarily and so continued to remain with him. Her entire conduct indicates that she had ample experience in such affairs.

It is urged by the prosecutor that the respondent "stood toward this woman for the time being in the place of her natural guardian and protector, and as such owed her a clear legal duty which he completely failed to perform." The cases cited and digested establish that no such legal duty is created based upon a mere moral obligation. The fact that this woman was in his house created no such legal duty as exists in law and is due from a husband toward his wife, as seems to be intimated by the prosecutor's brief. Such an inference would be very repugnant to our moral sense. Respondent had assumed either in fact or by implication no care or control over his companion. Had this been a case where two men under like circumstances had voluntarily gone on a debauch together and one had attempted suicide, no one would claim that this doctrine of legal duty could be invoked to hold the other criminally responsible for omitting to make effort to rescue his companion. How can the fact that in this case one of the parties was a woman change the principle of law applicable to it? Deriving and applying the law in this case from the principle of decided cases, we do not find that such legal

duty as is contended for existed in ²¹⁵ fact or by implication on the part of respondent toward the deceased, the omission of which involved criminal liability. We find no more apt words to apply to this case than those used by Mr. Justice Field in *United States v. Knowles*, 4 Saw. (U. S.) 517, Fed. Cas. No. 15,540: "In the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger; . . . and if such efforts should be omitted by anyone when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society."

Other questions discussed in the briefs need not be considered. The conviction is set aside, and respondent is ordered discharged.

Montgomery, Ostrander, Hooker and Moore, JJ., concurred.

Unintentional Homicides in the commission of unlawful or negligent acts are discussed in the note to *Johnson v. State*, 98 Am. St. Rep. 571.

An Attempt to Commit Suicide is not an indictable offense in the absence of an express statute to that effect: *May v. Pennell*, 101 Me. 516, 115 Am. St. Rep. 334. And the survivor of an attempted double suicide is not guilty of murder, unless the evidence shows beyond a reasonable doubt that he aided or encouraged the deceased to kill himself: *Burnett v. People*, 204 Ill. 208, 98 Am. St. Rep. 206.

ATTORNEY GENERAL v. COMMON COUNCIL OF THE CITY OF DETROIT.

[150 Mich. 310, 113 N. W. 1107.]

MUNICIPAL CORPORATIONS—Power to Engage in Manufacture.—A city has no power to engage in the business of brick-making without an express grant, when it is not essential or indispensable to the declared objects and purposes of the corporation, and when the needed brick can be purchased in the open market. (p. 626.)

C. Flowers, for the complainant.

P. J. M. Hally and T. E. Tarsney, for the defendants.

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310 HOOKER, J. The attorney general filed the bill in this cause to enjoin the city of Detroit from using a fund raised by tax for the purpose of paying for the construction of a municipal plant for the manufacture of brick to be used in paving, for which a contract had been made with one Frank Reich, by direction of the common council. The defendant has appealed from a decree sustaining complainant's contention, and perpetually enjoining the payment of the fund as prayed. The only question in the case is whether the legislature has authorized the city to make such a contract.

311 We agree with the opinion filed in the circuit court that the power to engage in the business of brick-making is not included in the powers expressly granted to the city, and that it is neither fairly implied in, nor incident to, such powers as are expressly granted, nor is it indispensable or even essential to the declared objects and purposes of the corporation. While the law permits municipal corporations to do those things which are necessary to accomplish the objects of their creation, under an implication of power (see 1 Dillon on Municipal Corporations, 4th ed., sec. 89; 8 Current Law, p. 1062), the right has not usually been held to go so far as to permit them to engage in the manufacture of articles necessary to their lawful enterprises, where they are in common use and are to be had in the open market.

The decree is affirmed, with costs.

McAlvay, C. J., and Carpenter, Ostrander and Moore, JJ., concurred.

A Municipal Corporation in operating a rock quarry beyond its corporate limits is performing an act ultra vires, though its purpose is to procure stone necessary for use in its streets: Donable v. Harrison, 104 Va. 533, 113 Am. St. Rep. 1056.

HAAPA v. METROPOLITAN LIFE INSURANCE COMPANY.

[150 Mich. 467, 114 N. W. 380.]

INSURANCE—LIFE.—Proofs of Death, being in the nature of admissions, are competent evidence in an action on a life insurance policy. (p. 628.)

INSURANCE, LIFE—Warranty as to Health—Knowledge of Agent.—The knowledge of a soliciting insurance agent, who is under no duty to discover the facts, and whose authority does not extend to receiving applications for life insurance or to receiving any communications upon the subject, that an application for insurance contains a false statement as to the condition of the applicant's health, cannot be imputed to the insurer, nor is he bound thereby. (p. 631.)

INSURANCE, LIFE—Warranty as to Health—Knowledge of Agent—Estoppel.—If a soliciting insurance agent who is under no obligation to discover the facts, and who has no authority to receive applications for insurance, has knowledge of a false statement in an application for life insurance as to the state of the applicant's health, his mere silence in regard thereto does not estop the insurer from taking advantage of such false statement, afterward made by the insured to another agent of the insurer charged with the duty of receiving the application upon which the insurer acted in issuing the policy. (p. 633.)

INSURANCE, LIFE—Breach of Warranty.—If life insurance is procured through a false statement in the application as to the state of the health of the applicant, the insurer, who was ignorant of the real facts at the time of issuing the policy, is not estopped to assert a breach of warranty in the application, by reason of communications as to the state of health of the applicant made by the insured to the insurer's agent, who had no duty resting upon him to discover the facts, and whose authority did not extend to receiving applications, or communications upon the subject. (pp. 633, 634.)

EVIDENCE of Fact Admitted.—It is not reversible error to permit a witness to testify to a fact admitted or already proven. (p. 634.)

INSURANCE, LIFE—Breach of Warranty—Direction of Verdict.—If the insured, while being examined for life insurance and knowing that she had heart disease, falsely stated that she was in good health, and though she could not read the application it was explained to her and the questions asked through an interpreter, and the application like the policy contained a provision that no liability should be incurred unless the policy was delivered while the insured was in good health, the court properly directed a verdict for the insurer, though a witness who was present at the examination testified that the insured was not asked whether she had heart disease. (p. 634.)

Assumpsit on a policy of life insurance. The court directed a verdict for the defendant. The plaintiff appealed.

P. H. O'Brien, for the appellant.

Chadbourne & Rees, for the appellee.

⁴⁶⁸ OSTRANDER, J. For more than a year before securing the policy of insurance, the insured had an incurable disease of the heart, of which fact and that she, on account of the disease, was liable to die suddenly, her husband, the beneficiary, was informed by the physician whom he had employed to treat her. She had been treated for this trouble in March and in October, 1904. The policy was issued in April, 1905, upon an application made therefor during the same month, and the application was made a part of the policy and a copy of it attached thereto. This disease resulted in her death in July, 1905. The beneficiary states, in the proofs of death, that the cause of death was heart disease, the physician certifies to the same fact and, also, that he attended her for the trouble in March and October, 1904, and in May, 1905, and that she had another physician in April, 1905, the month in which the policy was issued. The company denied liability upon the ground that the proofs of death showed that the policy was issued upon misrepresentations. The proofs of death, being in the nature of admissions, were competent evidence (*Hancock Mut. Life Ins. Co. v. Dick*, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119, 85 N. W. 459; *Krapp v. Metropolitan Life Ins. Co.*, 143 Mich. 369, 114 Am. St. Rep. 651, 106 N. W. 1107), and the facts recited are uncontradicted. The policy was not issued by the resident agent and solicitor of defendant, and was issued at the home office upon the application made by the insured, by the terms of which the deceased warranted that she had never had disease of the heart, that she was in sound health, that she had not within two years been under the care of a physician. The application contains an express ⁴⁶⁹ limitation of the powers of the agent. In the policy itself is the provision: "No obligation is assumed by the company unless, upon the delivery of this policy, the insured is alive and in sound health."

To meet the condition existing after the application and the proofs of death had been admitted in evidence, plaintiff was recalled and asked the following questions, answers to which were excluded:

"Q. Now, state to the court and jury whether you had any conversation with Mr. Warrala [the agent of defendant who solicited the insurance] relative to your wife be-

coming insured in this company prior to her becoming insured.

"Mr. O'Brien: This is material, if your honor please, for the purpose of showing that before this insurance was taken up Mr. Warrala was informed and well knew the physical condition of Mrs. Haapa and that at the time that this application was made he was a witness to the application and the agent of the company that presided over the making of the application for the policy and the agent who solicited the insurance, and that he wrote down whatever answers were made; that Mrs. Haapa did not talk English, and did not read or write English, and that she signed whatever he put on the paper at his solicitation.

"Q. State whether you have had any conversation about your wife's physical condition with Warrala just before this application was taken.

"Q. Did you have any talk with Mr. Warrala in which it was stated to him by yourself that you didn't feel that your wife's physical condition was such that she could get insurance and that he knew it?

"Q. Now, on the day that the insurance was taken or at any time before within two or three days, the day the application was made or any day within two or three days before, did you talk with Mr. Warrala about your wife becoming insured in this company?

"Q. Before this application was made, state whether Warrala talked with you about insuring your wife.

"The Court: The ruling of the court is broad enough to exclude all conversations between the agent of the 470 Metropolitan Life Insurance Company, and the witness prior to the date when the application was made, and you will have an exception, so you need not take up any more time asking particular questions. That covers the whole case."

It is said in the brief that the object of the testimony sought to be elicited was to show "That the agent of the defendant who solicited the insurance knew the physical condition of the assured, in order to show that the defendant waived the right to rely on the warranties as to her physical condition, and as to the nonexistence of heart disease."

And, again: "The purpose of this testimony was not to vary the contract, but simply to show that with full knowledge of the physical condition of the insured, the defendant decided to issue the policy."

The theory of counsel, as indicated by these statements and by the authorities cited, is not supported by the facts. The undisputed facts are that on April 10, 1905, the insured signed a paper, reading:

"I intend to make application to the Metropolitan Life Insurance Company upon the following blank form, and do hereby sign my name in the presence of the company's agent, who will make report to the company upon the proposed risk, so that my signature to the application may be identified.

EMMA S. HAAPA,

"Signature of Proposed Applicant.

"J. E. WARRALA,

"Signature of Witnessing Agent."

She, at this time, made and signed no other paper. The agent made a report which contains nothing material here. It contains the full name of the applicant, the name and relationship of the proposed beneficiary, the amount of the indemnity, of the semi-annual premiums, the sex, color, date and place of birth, age, postoffice address, etc., of the applicant. The deceased was asked to make and made no representations whatever concerning ⁴⁷¹ her health or physical condition. The single question relating to this subject is addressed to the agent and is: "Does the person appear to be a good risk in every respect and do you recommend that a policy be issued?" This was answered. "Yes." This report was filed in the local office, and later, on April 14th, the examining physician visited the applicant, and on that day the application to the defendant company was made and signed by the insured. It was upon the "blank form" referred to in the paper which the insured had already signed. In it are the warranties, breaches of which are relied upon. There was but one application relied upon by the company. It was made April 14, 1905, and the solicitor, Warrala, was not present. It was the physician who filled in the application. According to his testimony, all of the questions contained in the application were put to the insured, an interpreter who

spoke the language of the insured being employed for that purpose. The insured afterward signed it. No one claims that the husband and beneficiary had ever told the examining physician that his wife had heart disease. The question presented is, then, whether the fact, if it is a fact, that the solicitor, Warrala, who had nothing whatever to do with making the application, was told by the husband and beneficiary that his wife had heart disease, requires that his knowledge so obtained should be, for any purpose, imputed to the defendant. It is clear that the defendant did not, in fact, know of any representations concerning the health of the assured except those contained in the application. Those representations were, admittedly, false. They were material; so much so that it may be assumed that if the truth had been told no policy would have been issued.

The rule of *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638, is that: "If there has been no fraud and no concealment, but a full and frank statement of all the facts, and the insurer has framed the papers to suit himself, in view of all the circumstances, the law would justly be subject to the reproach ⁴⁷² of favoring deception and fraud, if the insurer was allowed to retain the premium, and at the same time repudiate the contract, for his own failure to make its recitals correspond exactly with the facts."

In that case, it appeared that: "The plaintiff claims that he gave the agent full information on the subject [of encumbrances], and insists that if there was any failure to mention it in the application, it was for reasons operating exclusively upon the mind of the agent, and not affecting his own action. We think evidence of these facts was competent. Its purpose was, not to vary or contradict the contract of the parties, but to preclude the party who had framed it from relying upon incorrect recitals to defeat it, when he himself had drafted those recitals, and was morally responsible for their truthfulness."

It is pointed out in the opinion that: "Where the particular fact called for by an interrogatory is unimportant, or nearly so, under the circumstances of the particular case, it is very easy for the assured to be led to suppose that such interrogatory, which he knows was prepared generally and for the purpose of meeting the cases in which it would be of practical importance, was not to be relied upon

in his own case, and if the insurer himself, or his agent, drafts an answer to such interrogatory, in which he treats it as immaterial and does not observe strict accuracy in his statement of facts, the assured might well suppose he would be thought captious and hypercritical if he should insist upon answers exactly correct, when the party seeking the information, and who alone was interested in it, was satisfied with statements less accurate, and which, with full knowledge of the facts, he had written out to suit himself."

In *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610, the rule followed, so far as it is material here, is that whether or not the applicant made the answers to the agent as written in the application was a question for the jury. If she made them, their truth or falsity should have been inquired into. If she did not make them or any of them and they were filled in after she signed the application, without her knowledge or consent, as to answers so inserted ⁴⁷³ the company was precluded from relying upon their falsity. In the following cases and others the knowledge of the agent who took the application of facts untruthfully stated in the application is the point considered: *Perry v. John Hancock Mut. Ins. Co.*, 143 Mich. 290, 106 N. W. 860, 147 Mich. 645, 111 N. W. 195; *Van Houten v. Metropolitan L. Ins. Co.*, 110 Mich. 682, 68 N. W. 982; *Temminck v. Metropolitan L. Ins. Co.*, 72 Mich. 388, 40 N. W. 469; *Beebe v. Ohio L. Ins. Co.*, 93 Mich. 514, 32 Am. St. Rep. 519, 53 N. W. 818, 18 L. R. A. 481. In *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131, 17 N. W. 726, there was an alleged failure to inform the agent of an encumbrance upon the insured property. There was no written application and no preliminary examination of the applicant by the agent. It is said: "If an insurer is apparently indifferent whether a property is unencumbered and is content to insure without in any way suggesting an interest in the question, the bare silence of the applicant upon it cannot be deemed a misrepresentation. If the applicant is guilty of no misleading conduct, the insurer in such a case must be taken to assume the risk incident to the undisclosed encumbrance. It must not be intended that the principle would hold in regard to incidents obviously implying unusual risks, and not likely to be discerned or contemplated by the insurer. The case requires no ob-

servations on that subject. It is sufficient to suggest the distinction."

It is said, further, in *Ketcham v. American Mut. Accident Assn.*, 117 Mich. 521, 76 N. W. 5: "The courts have always been anxious to take care of the rights of the assured when the applicant has relied upon the agent informing the company what had been truthfully told to him about the character of the risk; but the courts never have said the company is bound by statements contained in an application, when not only the agent, but the assured, knows they are untrue, and calculated to deceive, and the application is to be forwarded to the company as the basis of its action. To so hold would put these organizations completely at the mercy of dishonest and unscrupulous agents."

The decisions of this court are not conflicting, and must be read and considered together for the purpose of discovering and following the rule of law applicable to the ⁴⁷⁴ question under consideration. Assuming that the testimony sought to be elicited would have tended to prove that the husband had informed the soliciting agent, Warala, that his wife had heart disease and was liable to die suddenly on account thereof, there are two sufficient reasons why such testimony should not have been received. In the first place, the disclosure claimed to have been made was not made to the agent of defendant whose duty it was to discover the facts, but to one whose authority as disclosed by his acts, and whose authority in fact, did not extend to receiving the application or any communication upon the subject. Mere silence on the part of such an agent cannot be held to estop the defendant where afterward the person insured represented to another agent, charged with the duty of receiving the application for insurance, facts upon which the defendant acted in issuing the policy. In the second place, the plaintiff who urges the estoppel or waiver does so from a position which for that purpose the law will not permit him to occupy. He sought indemnity for the death of his wife. The physician had told him, "she would have those spells off and on and that she would die suddenly some time."

He owed some duty to know that the defendant did not, in ignorance of that fact, sell him the indemnity. The contract of indemnity was itself notice to him that the defendant did not possess such notice or knowledge and

would be defrauded if required to pay. The cases of *Gristock v. Royal Ins. Co.*, 87 Mich. 428, 49 N. W. 469, and *Hartford Steam Boiler etc. Ins. Co. v. Cartier*, 89 Mich. 41, 50 N. W. 747, have no application.

The ruling upon the question asked the witness Dr. Yarrington was not prejudicial error. He was the attending physician, who made the certificate which was a part of the proofs of death. He was asked, "What was the matter with her, what was the cause of her death?" Over objection, he was permitted to answer: "Heart failure, from failure of compensation causing mitral insufficiency. That would come within the general disease ⁴⁷⁵ called disease of the heart or heart failure." This fact was and is admitted. It was already proven.

A witness, a neighbor, who claimed to have been present when the examining physician took the application, testified that the assured was not asked whether she had been attended by a physician within two years, or whether she had heart disease. It is contended that in view of this testimony, which is disputed, it was error to direct a verdict for defendant. This upon the theory that a question of fact was presented upon the subject of the knowledge of the assured that she had made, in signing the application, any warranties concerning either of those subjects. But the testimony is not disputed that other questions contained in the application were put to her, in her own language. One affirmation is, "I am now in sound health." Another, "I have never met with any serious personal injury, nor ever been seriously ill, except as stated below." Another, "The following is the name of the physician who last attended me, the date of the attendance, and the name of the complaint for which he attended me." And the application, like the policy, contains the provision (agreed to in the application) that no liability shall be incurred by the company unless the policy is delivered while the assured is in good health. Beyond this, the examination which was made apprised her of its purpose—of the knowledge sought. And her physician had informed her of her ailment. In my opinion, a finding that these specific questions were not asked her and that she could not read the application which she signed would not, in view of the other testimony and of the knowledge which the nature of the examination con-

veyed, support a recovery. It follows that, upon the whole record, the trial court committed no error in directing a verdict for defendant.

The judgment is affirmed.

Carpenter, Grant, Blair and Montgomery, JJ., concurred.

The Question Whether the Knowledge of an Insurance Agent of facts untruthfully stated in an application will be imputed to the insurance company so that it will be held to have waived the breach of warranties contained in the policy is discussed in the note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 106. It has been affirmed that if one who is agent of the insurer knows the breach of a condition in a policy, but acquires the knowledge when acting in the business of another principal, such knowledge is not imputed to the insurer unless shown to have been in the agent's mind when acting for the latter: Foreman v. German etc. Ins. Assn., 104 Va. 694, 113 Am. St. Rep. 1071.

LAUNSTEIN v. LAUNSTEIN.

[150 Mich. 524, 114 N. W. 383.]

WATERS, SURFACE—Rights of Dominant Estate.—A land owner has the right to have the surface water which flows from his farm follow its natural course. If that takes it across the lands of an adjoining owner, the latter has no right to interrupt this flow of the water in its natural course or direction. (p. 637.)

WATERS, SURFACE—Prescriptive Right.—An easement may be acquired by prescription by which the water collected upon the lands of the upper proprietor may be allowed to overflow the lands of an adjacent proprietor. (p. 637.)

WATERS, SURFACE—Right to Fill Sag Holes on Dominant Estate.—The owner of the dominant estate may, in the interests of good husbandry, and in the good faith improvement and tillage of his land, fill up sag holes thereon, so that no water will accumulate or stay in them, even if the water arising from rainfall or melting snows should thereby, in natural processes, find its way upon the servient estate and incidentally increase the flow thereon. (p. 637.)

WATERS, SURFACE—Artificial Drains.—The owner of the dominant estate cannot, by artificial drains or ditches, collect the water of stagnant pools, sag holes, basins or ponds upon his premises, and cast them in a body upon the proprietor below, to his injury. (pp. 637, 638.)

WATERS, SURFACE—Right of Dominant Owner—Enlargement of Culvert.—The enlargement of a culvert across a highway, to carry off surface water from the dominant estate, does not injuriously affect the adjacent proprietor, if, in times of high water, the water coming from the dominant estate, which does not find its way through such culvert, will in any event force its way across the highway and upon the lands of the servient estate. (pp. 638, 639.)

Watson & Chapman, for the complainant.

Walsh & Pardee and J. T. McCurdy, for the defendants.

525 MONTGOMERY, J. This bill is filed to enjoin the defendants from maintaining a sluiceway in the highway adjacent to complainant's premises, and for a mandatory injunction requiring the defendant, Oliver Launstein, to fill up the drains upon his farm which carry water from off said Oliver Launstein's farm down through said sluiceway in question and upon the land of complainant.

Complainant and defendant Launstein own each eighty acres of land, the complainant on the west, and the defendant on the east, side of a north and south highway in the township of Owosso. At a point some twenty rods south of the northerly line of the two proprietors there is an open ditch extending westerly across lands of complainant, emptying into a public drain known as Wilkinson's drain, which in turn empties into Maple river.

The bill alleges that for the past eight years the defendant Launstein has been draining his farm and turning the waters down to and upon the highway in question, and has caused a larger amount of water to flow from his farm down upon the highway than would naturally flow there and drain from his land. That in May, 1904, the defendants came to the highway and dug a drain across said highway and placed in the drain across the roadbed a large wooden culvert which was intended to and did carry the water from the highway and from said Oliver Launstein's farm over and upon the improved land of complainant. That said sluice and drain was about forty rods south of where the large open drain above referred to was located.

The answer admits that the defendants constructed the **526** culvert in question, but avers that this was built to replace a culvert which had been in place upon this highway for many years. Defendants further alleged that they were acting under the authority of the highway commissioner in repairing said culvert, and aver that it was placed there in good faith and was done for the sole purpose of improving the condition of the highway. Defendant Launstein avers that the natural drainage from his land of the surface water is to the northwest, and that the water naturally flows across said highway at about the point where this

culvert in question is located and across the lands of the complainant to the northwest until it reaches the Wilkinson drain, so called. He denies that he is draining his land and the sag holes on his farm other than they have been drained for the past twenty years and upward, and denies that the drainage is any other than is practiced in good husbandry. That complainant has somewhat impeded the flow of water in its natural course by an embankment on the easterly side of his land. Defendant also shows that there has been for many years a drain or ditch running westerly from the culvert in question on complainant's land which serves a double purpose of draining complainant's land and carrying away the water which in its natural course reached this point from defendant's land, and the defendant asks relief and that complainant be required to remove the embankment and be peremptorily enjoined from refilling the ditch and be required to maintain the ditch for the purpose of drainage aforesaid.

The legal questions involved in the case are not difficult. The case of *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90, which has been frequently cited and followed by this court, furnishes the rule of law for the case. The defendant undoubtedly has the right to have the surface water which flows from his farm follow its natural course, and if that takes it across the lands of complainant, then complainant has no right to interrupt this flow of water in this natural course or direction. To that extent the complainant's is the servient estate.

⁵²⁷ It was held in *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90, following *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595, that an easement may be acquired by prescription by which the water collected upon the lands of the upper proprietor may be allowed to overflow the lands of an adjacent proprietor; and that the owner of the dominant estate may in the interest of good husbandry, and in the good-faith improvement and tillage of his farm, fill up the sag holes, so that no water will accumulate or stay in them, even if the water arising from rainfall or melting snows should thereby, in natural processes, find its way upon the servient estate and incidentally increase the flow thereon. It was also held that the owner of the dominant estate cannot by artificial drains or ditches collect the waters of stagnant pools, sag

holes, basins or ponds upon his premises, and cast them in a body upon the proprietor below, to his injury.

These rules of law furnish a sufficient guidance for the determination of this case, and the question gets down to one of fact. The case has on this branch given us no little trouble, and it has required a most careful examination of the testimony, and the conclusions which we have reached are as follows: 1. That the surface water which flows from the land now owned by Oliver Launstein has always found its outlet at about the point where the culvert is constructed over and thence across the highway into the lands of complainant and over his land in the direction of the present location of the Wilkinson drain; 2. That for many years the flow of water has been accelerated and increased by a shallow ditch dug at the bottom of a natural ravine extending across the lands of defendant Launstein and by other ditches leading into the same and of less importance. That this flow of water has been conveyed in this manner across and off these premises for more than the statutory period is undoubted.

The only question that could arise is whether by increasing the size of this ditch the flow has been increased beyond that fixed by the prescriptive right. The evidence ⁵²⁸ shows that the ditch first consisted of two plowed furrows and perhaps a third in the center, its construction resulting in throwing up loose dirt on either side of the ditch. It also shows that in late years defendant Launstein has scraped this loose dirt farther back from the bottom of the ditch for the purpose of enabling him to drive mowing machines and other farm implements across the ditch. We are not convinced that this has increased the capacity of the ditch for carrying water. The ditch has not been lowered, and if spread out over more land it would seem that more water would percolate into the soil than if it were kept in a narrow space. Moreover, the testimony fairly indicates that the bottom of the ditch is not now at as low a grade as when first constructed.

The question which has given us more doubt is whether the drainage from the sag hole has been increased. But upon this question we think the weight of the testimony is with the defendant, that from the time the land was improved the custom has been to turn an ordinary furrow from these sag holes in the ground and from time to time

fill in the sag holes by scraping dirt into them freely. Except in filling in the sag holes which the defendant had, under the cases cited, a perfect right to do, there has been no increased facility of flowage from the sag holes or ditch to the ravine in question. We are satisfied, therefore, that upon the facts the complainant has failed to make a case.

The evidence indicates that the complainants' relief is open to himself; that by reopening and keeping open this ditch in question, or if not by this means, by carrying a ditch on the westerly side of the highway north to the open ditch referred to, he can take care of the water which in right comes from defendant's land to his own.

As to the culvert, the evidence is that this culvert is substantially the size—possibly a little larger—than the one which it was built to replace. But the fact of its being larger does not injuriously affect the complainant, for the ⁵²⁰ reason that in high water if the water coming from defendant's premises does not find its way through this culvert it will force its way across the highway and upon the lands of complainant: See *Chapel v. Smith*, 80 Mich. 100, 45 N. W. 69.

So far as the relief prayed for by defendant against complainant is concerned, we think that the embankment which does not cross the open ditch extending easterly from the sluice in question cannot be said to work injury to defendant by damming up the water. It is lower than the highway opposite. If any injury results to defendant it must be from the stoppage of this drain. We think complainant should be required by the decree to keep the drain in question open to its original depth. The damages proven by defendant are insignificant—too slight indeed to be considered.

The decree will be for the defendant in form indicated in this opinion, and defendant will recover costs of both courts.

Grant, Blair, Ostrander and Hooker, JJ., concurred.

A Land Owner in Improving His Property may accelerate the flow of surface water from his premises to those of his neighbor, without becoming liable for the results, if he does only what is necessary to accomplish the improvement and is not negligent in doing it: *Ginter v. St. Mark's Church*, 95 Minn. 14, 111 Am. St. Rep. 438. Thus he may fill up pools and sag holes on his land: See the note to *Mizell v. McGowan*, 85 Am. St. Rep. 730. And he may deepen the depression

in the rim of a natural basin on his land, through which the water naturally passes upon the land of his neighbor, so as to entirely drain the basin and discharge upon the servient estate large quantities of water which otherwise would never have reached it: *Fenton etc. R. R. Co. v. Adams*, 221 Ill. 201, 112 Am. St. Rep. 171.

DANLEY v. JEFFERSON.

[150 Mich. 590, 114 N. W. 470.]

WILLS—Revocation—Revival by Oral Declarations.—A will revoked by express declaration contained in a will of later date cannot be revived or vitalized by the destruction of the later will, and oral declarations of the testator before witnesses expressing a desire that the prior will shall stand and that it is the one which he wants executed. (p. 641.)

The facts appear from the dissenting opinion of Mr. Justice McAlvay, which is hereto appended.

Rockwell & Zimmerman, for the appellant.

Patterson & Patterson and M. B. Farrington, for the appellee.

590 OSTRANDER, J. I do not believe that the members of the legal profession, generally, have understood that the use of the word "re-publication," in the opinion in *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 64 N. W. 455, 37 L. R. A. 561, was intended to commit the court to the doctrine that a will, revoked either by express declaration contained in a will of later date or by operation of law, can be vitalized by oral declarations of the testator. Our statute, unlike that of some other states, does not prescribe publication as one of the forms to be observed in executing a will, so that the use of the term "re-publication" in the opinion cannot be referred to a new or second observance of a particular form. And the questions considered in *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 64 N. W. 455, 37 L. R. A. 561, did not require a determination of requirements necessary to establish the validity of a will once expressly revoked. Treating the question as a new one, considering the policy of our law as evidenced by the statute of frauds and the statute of wills, the rule of law—to the employment of which this court is committed—that a revocatory clause in a will properly executed destroys, at once, the earlier

testament, which is not revived by the destruction of the revocatory testament, it seems to me that the legal sufficiency of the earlier will should not be determined by the intention of the testator as evidenced by his oral declarations. The safer and better rule is that, neither will being effective without some further action on the part of the testator, his intentions should be expressed in writing, formally sufficient to satisfy the statute: *In re Noon's Will*, 115 Wis. 299, 95 Am. St. Rep. 944, 91 N. W. 670. See, also, *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699; *Wirth v. Wirth*, 149 Mich. 687, 113 N. W. 306. This court, having declined to follow the rule of the English law courts, is not relegated of necessity to that of the ecclesiastical tribunals: See these rules stated and compared in *Rudisill's Exr. v. Rodes*, 29 Gratt. (Va.) 147. And if revival of a ⁵⁹⁷ will expressly revoked may be accomplished by oral statements, there is no apparent reason why intention may not be considered for such a purpose when a will is revoked by operation of law. In either case the will stands revoked; in either case the testator may, undoubtedly, make a new will precisely like the one revoked. In my opinion, the court below was right, and the judgment should be affirmed.

Grant, C. J., and Blair, Montgomery, Hooker and Carpenter, JJ., concurred with Ostrander, J.

Mr. Justice McAlvay Delivered a Dissenting Opinion, which was concurred in by Mr. Justice Moore. Mr. Justice McAlvay said, in part, that "On October 6, 1905, Edwin B. Jefferson, of the age of seventy-three years, made his last will and testament, disposing of all of his estate. It is unnecessary to set forth this instrument, as no question is raised as to its provisions or the regularity of its execution. It contained a clause revoking all former wills. Proponent, a nephew of deceased, was named executor. This will was signed by the testator and witnessed at the banking office of Mr. Jossman, in Clarkston, Michigan, where he resided. This will remained in the bank with testator's other papers until seven or eight weeks later, when he requested Mr. Jossman to come to his house, saying that he desired to make another will. The second will was drawn as testator directed. The first will was used as a guide and but one material change was made. When the second will was made the first one was left with the testator and the second was kept at the bank. The second will named the same executor as the first, and contained a clause revoking all former wills.

“On February 20, 1906, the testator, who at the time was stopping at the house of his cousin, Mrs. Helen Beach, in Clyde, requested proponent to go to the bank at Clarkston and upon his written order get him this second will. Proponent, accompanied by Mr. Beach, went to Clarkston and received the will from the bank, and also went to testator's house in the same village and got the first will for him from his family Bible, where it had been kept. They brought both wills and gave them into his hands. Testator then stated that he had done wrong in cutting out Mrs. Beach, and he wanted to correct it by destroying the last will and letting the other stand, in which Mrs. Beach was mentioned. He took both wills and examined them closely, reading them through. He then gave proponent the last will, directing him to burn it. After the last will was burned testator put the first will in its envelope and sealing it handed it to proponent saying, ‘Hold the will, because that is the will I want executed.’ Four persons were present at the time of this occurrence, two of whom were not interested. It was admitted that all of them would testify to these facts as here related. The earlier will is the one contested in this suit. Upon these undisputed facts, at contestant's request, the trial judge directed a verdict in his behalf. Proponent assigns error upon such direction. A motion for a new trial was denied, upon which error is also assigned. Proponent asks this court to reverse the judgment of the circuit court.

“There is but one question in the case, whether a will once revoked by an express revoking clause in a later will can be revived on the destruction of the later will where the prior will has been carefully preserved by the testator, and where the testator, in the presence of disinterested witnesses, solemnly and deliberately directed that the later will be burned, and at the time of its destruction directed the executor to hold the prior will, declaring that it was the will he wanted executed, and at the same time giving his reasons for such action and direction.”

Mr. Justice McAlvay cited the cases of *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799, *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698, and *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 37 L. R. A. 561, 64 N. W. 455, and said that “From these decisions we find that it is clearly established in this state that the mere destruction of a will which expressly revokes a former will does not revive the earlier will; but that a re-publication is necessary. The law is too well settled in this state upon this proposition to again go over the ground covered by the Michigan cases above cited and the authorities upon which they rest. Upon these authorities it is clear that the first will of Mr. Jefferson—being the will offered for probate in the case at bar—was expressly revoked by the later will, and is now of no force or effect unless, by the destruction of the later will and the acts and declarations of the testator at the time of such destruction, this will was revived by re-publication. It is clear that both cases above

quoted, as well as the cases cited by them, hold that such a will may be revived. In several of the United States and in England statutes provide the method for the revival and re-publication of revoked wills. In this state there is no such statutory provision.

“In *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 64 N. W. 455, 37 L. R. A. 561, this court said: ‘The former will thus revoked cannot be revived except by re-publication.’ Our statute does not specify publication as a requisite to the validity of a will. In those states where publication is expressly required by statute the courts have held that any method whereby the testator communicates to the witnesses that the instrument is his last will and testament is a sufficient publication: *Buzby v. Darnell*, 52 N. J. Eq. 337, 31 Atl. 382; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; *Lane v. Lane*, 95 N. Y. 494; *In re Beckett*, 103 N. Y. 167, 8 N. E. 506; *In re Hunt*, 110 N. Y. 278, 18 N. E. 106.”

In conclusion, Mr. Justice McAlvay said that “under the circumstances of this case, the acts and declarations of the testator as above stated, in the presence of disinterested witnesses, clearly indicated his intent and purpose not to die intestate, but to revive his former will, and such acts and declarations amounted to and were a re-publication of said will, which thereby revived and operated as the last will of proponent’s decedent.”

The Revival of Revoked Wills is discussed in the notes to *Matter of Stickney*, 75 Am. St. Rep. 249, and *Harpwell v. Sively*, 76 Am. Dec. 652.

MORSE v. HAYES.

[150 Mich. 597, 114 N. W. 397.]

LIMITATION OF ACTIONS—Death of Debtor—Extension of Time.—A statute providing that if any person entitled to bring any of the actions before mentioned therein, or liable to any such action, shall die before the expiration of the time limited therein or within thirty days after the expiration of such time, and the action survives, it may be commenced by or against the executor or administrator of the deceased, or the claim may be proved as a debt against the estate of the deceased, at any time within two years after granting letters testamentary or of administration, and not afterward, if barred by the provisions of the statute, does not apply to causes of action barred more than thirty days before death, nor to causes of action not barred until more than two years after the granting of letters testamentary or of administration. (pp. 646, 648.)

Morse & Locke, for the appellant.

R. A. and W. E. Hawley, for the appellee.

⁵⁹⁸ CARPENTER, J. This suit is brought to recover upon a judgment rendered in the circuit court for the county of Ionia on the 16th of September, 1895, against said defendant, and in favor of George W. Webber and Andrew J. Webber, a copartnership doing business as Webber Bros. George W. Webber died January 15, 1900. From this time the surviving partner, Andrew J. Webber, had possession of the partnership assets until his death, which occurred October 17, 1902. November 28, 1902, Mary C. Webber was appointed executrix of the last will and testament of the said Andrew J. Webber, and at once qualified as such, and has continued in that office until the present time. In May, 1903, the executrix of George W. Webber filed a bill for an accounting in the circuit court for the county of Ionia, in chancery, against the executrix of said Andrew J. Webber. During the progress of said cause plaintiffs were appointed receivers of the partnership effects. They commenced this suit on the 24th of September, 1906. The question is whether the action is barred by the statute of limitations. The circuit court decided that it was not, and rendered a judgment in favor of plaintiffs. Is that decision correct? The action is clearly and confessedly barred by the statute, unless it is preserved by section 9737 of 3 Compiled Laws. That section reads: "If any person entitled to bring any of the actions before mentioned in this chapter, or liable to any such actions [the action in question is one of the before-mentioned actions described in the chapter], shall die before the expiration of the time herein limited or within thirty days after the expiration of the said time, and if the cause ⁵⁹⁹ of action does by law survive, the action may be commenced by or against the executor or administrator of the deceased person or the claim may be proved as a debt against the estate of the deceased person, as the case may be, at any time within two years after granting letters testamentary or of administration, and not afterward, if barred by the provisions of this chapter."

By the provisions of that chapter (see section 9751, 3 Compiled Laws) this action might be brought "within ten years after the entry of the judgment, and not afterward"; that is, it would be barred on the 16th of September, 1905. It follows, therefore, that November 28, 1902, when letters testamentary were granted to the executrix of Andrew J.

Webber there remained a period of two years, nine months, and eighteen days in which this action might be brought. The action was barred because not brought within this time, unless that time was extended by section 9737. Does section 9737 extend this time? It was contended by the appellee and decided by the learned circuit judge that it does. Their contention is based upon the case of *Stringer v. Stephens' Estate*, 146 Mich. 181, 117 Am. St. Rep. 620, 109 N. W. 269, 8 L. R. A., N. S., 393, recently decided by this court. That case does support their contention. This court there decided that "from the time of her (the creditor's) death the running of the statute was suspended until two years from the appointment of her administrator." The opinion in that case proceeds upon the ground—not that the question of the proper construction of the section is an open one—but that it has already been authoritatively determined by this court. That decision is, therefore, based, not upon argument, but upon authority. The authority relied upon is *Field v. Loveridge*, 114 Mich. 220, 72 N. W. 160. In *Field v. Loveridge*, the court said: "The statute of limitations would be suspended at her (the creditor's) death. The statute would not commence to run again until two years after letters of administration were granted."

In that case the letters of administration were granted August 11, 1893, and suit was commenced November 20, 1894. Under what we shall endeavor to show was a proper construction of the statute suits might be commenced at any time within said two years after the letters are granted. There was no occasion, therefore, for the court to say the statute was suspended during these two years and that statement was, therefore, a mere dictum. In *First Nat. Bank of Paw Paw v. Sherman's Estate*, 117 Mich. 602, 76 N. W. 97, the opinion states: "The death of the debtor suspends the running of the statute of limitations. It suspends the statute for two years after granting letters testamentary or of administration, and not afterward."

The decision in that case did not, however, accord with this statement. One of the claims in suit was dated December 27, 1886, and was due six months after date, or June 27, 1887. The debtor died December 22, 1887. Letters of administration were granted January 26, 1891. It

will be observed that the statute of limitations had run less than six months at the time the debtor died. If it is true that the operation of the statute was suspended from the creditor's death until two years after the grant of said letters, this claim would not have been barred until July 31, 1893; but this court in that case held that it was barred on or before March 9, 1897—the date of its presentation against the estate.

We feel compelled to say that the statute is not open to the construction contended for by appellee, and that the decision of *Stringer v. Stephens' Estate*, 146 Mich. 181, 117 Am. St. Rep. 620, 109 N. W. 269, 8 L. R. A., N. S., 393, must be overruled. The language of the statute is not ambiguous. It contains no language to indicate that the operation of the statute of limitations is suspended from the time of death until two years after the grant of letters of administration. It gives a period of two years—and of two years only—after the grant of letters testamentary or of administration in which to enforce certain causes of action. What are the causes of action which may be enforced “at any time within [said] two years?” Manifestly ⁶⁰¹ they are the causes of action which would otherwise become barred in the period ensuing between the thirty days before death and the two years after the granting of letters of administration. This was the construction placed by the supreme court of Wisconsin (see *Curran v. Witter*, 68 Wis. 16, 60 Am. St. Rep. 827, 31 N. W. 705, and *Palmer v. O'Rourke*, 130 Wis. 507, 110 N. W. 389) upon a section differing in no material respect from that under consideration, except this, viz., it did not contain the words “and not afterward, if barred by the provisions of this chapter.” We think that construction correct. Otherwise, we would impute to the legislature the intent to include among the causes of action which might be enforced in said two years either or both of the following classes: (a) Causes of action which were barred more than thirty days before death; and (b) causes of action which were not barred until more than two years after the granting of letters testamentary or of administration. It is clear and everyone will concede that causes of action embraced in class “a”—those that become barred by the statute of limitations more than thirty days before death—are not included in the section. It is equally clear that causes of action embraced

in class "b"—those that have more than two years to run after the grant of letters testamentary or of administration—are not included. For, if they are, we must declare that the legislature, in attempting to enlarge the time for the enforcement of causes of action that had just expired or were about to expire, intended to shorten the time for the enforcement of other causes of action. It is clear that it had no such intent.

Does that section have a different meaning because the legislature, after stating the cause of action mentioned in the section might be enforced "at any time within two years," added the following significant words, "and not afterward, if barred by the provisions of this chapter"? Manifestly not. Those added words, instead of detracting from, strengthen the foregoing reasoning. They are equivalent to an express declaration ⁶⁰² that the causes of action which may and must be enforced within said two years are only those which would otherwise become "barred"—barred before the lapse of said two years—"by the provisions of this chapter." They remove all possibility of inferring—and as already stated, I do not think that in their absence we could have so inferred—that the section covers causes of action which do not become barred in the time therein mentioned.

We conclude, therefore, that causes of action which do not become barred within the time mentioned in the section—and that includes causes of action like that in controversy, which are not barred within two years after the granting of letters testamentary or of administration—are in no way affected by the section.

This construction gives proper effect to the language of the legislature. It accords with justice and good sense. Those having causes of action which are not affected by the section, viz., causes of action which are not barred within two years after the grant of letters testamentary or of administration, already have more than two years in which to enforce them. Those having causes of action which are affected by the section, viz., causes of action which are barred within two years after the grant of letters testamentary or of administration, are given two years for their enforcement. The section thus insures a period of two years after the grant of letters testamentary or of administration for the enforcement of all causes of action which

survive death. (Included among these causes of action are, as heretofore stated, those which, except for the section, become barred thirty days before death.) This would seem to accomplish the legislative purpose of granting a reasonable time for the enforcement of all such causes of action which survive death. According to the construction contended for by appellee, if a judgment creditor or debtor should die within the first year after a judgment was rendered, the statute of limitations would not bar action thereon until eleven years after the grant of letters testamentary or of administration; ⁶⁰³ while if there had been no death, or if the judgment had been rendered after death, action would have been barred in ten years. Other instances leading to consequences quite as absurd will readily suggest themselves.

We conclude that section 9737 has no application to the action in controversy, and that the circuit court erred in refusing to direct a verdict for defendant.

The judgment should be reversed, and no new trial granted.

Grant, C. J., and Blair, Montgomery, Ostrander, Hooker and Moore, JJ., concurred.

McAlvay, J., concurred in the result.

For Authorities bearing upon the question involved in the principal case, see Black v. Elliott, 63 Kan. 211, 88 Am. St. Rep. 239; Rowan v. Chenoweth, 49 W. Va. 287, 87 Am. St. Rep. 796; Guethler v. Altman, 26 Ind. App. 587, 84 Am. St. Rep. 313; Moore v. Russell, 133 Cal. 297, 85 Am. St. Rep. 166.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**HEMAN CONSTRUCTION COMPANY v. WABASH RAIL-
ROAD COMPANY.**

[206 Mo. 172, 104 S. W. 67.]

TAXATION, SPECIAL—Street Improvement—Railroad Right of Way.—Under a city charter expressly providing that all property within a defined district to be benefited shall be subject to special taxes for street improvement therein, railroad rights of way within such district are subject to such taxes. (p. 655.)

TAXATION, SPECIAL—Railroad Right of Way—Public Highways.—A railroad right of way is not a public highway within the meaning of a constitutional provision exempting public highways from taxation, so as to exempt it from special taxes for local improvements within a city. (p. 659.)

TAXATION, SPECIAL—Railroad Right of Way—Lien for Taxes.—Under a city charter expressly providing that all property within a defined district to be benefited shall be subject to special taxes for street improvements therein, an assessment and tax bill for such purpose against a railroad right of way therein is a lien thereon. (p. 661.)

H. Grover, H. P. Rogers and C. W. Bates, for the appellant.

H. W. Blodgett, for the respondents.

174 BURGESS, J. This is a suit on a special tax bill for street improvement, issued by the city of St. Louis in favor of the plaintiff, against real property in said city owned in fee by the defendant railroad company, and upon which the other defendants in the case hold encumbrances by way of deeds of trust, part of which property is used by said defendant railroad company as part of its right of way over which it operates trains. The origin of the special tax bill was the enactment of an ordinance by the municipal assembly of the city of St. Louis, providing for the paving of Audubon

avenue with vitrified brick, between Taylor and Euclid avenues, in said city.

The petition is in the usual form for the enforcement ¹⁷⁵ of a special tax bill issued by the city of St. Louis for proportionate cost of construction of a street adjacent to the property of the defendant railroad company. It alleges the incorporation of the various defendants, their interests in the property, which is fully described, the particulars of the tax bill, notice of the issuance thereof, and concludes with prayer for judgment for the amount of the bill, with interest and costs, and that the same be declared a special lien against the real estate described.

The amended answer of the defendant railroad company, and of all the other defendants answering, sets forth the defenses: First, general denial; second, that the pretended assessment violates the constitution and laws of Missouri and of the United States; third, exemption from assessment; fourth, that the land assessed is exempt because a part of a right of way, and, therefore, a public highway; fifth, exemption from said assessment, and any lien claimed thereunder, as a right, privilege, title and immunity guaranteed under the constitution and laws of Missouri and of the United States, and the charter of the city of St. Louis.

It was admitted by counsel that the special tax bill sued on, No. 19,590, dated November 7, 1903, and which was introduced in evidence without objection, was signed by the proper officers of the city of St. Louis, and that said tax bill remains unpaid; that notice of issuance of the said tax bill was duly given to defendants by plaintiff, and that on the fifth day of April, 1904, defendant, the Wabash Railroad Company, was duly served with notice to the effect that owing to its failure to pay the first installment of said tax bill within the time provided by law, plaintiff, as holder of said bill, had exercised its option and declared the entire bill to be immediately due and collectible.

The evidence shows that the main line of the Wabash railroad on which its trains pass eastward and ¹⁷⁶ westward run on and along the length of the strip of land in question, but that a portion of same, fronting twenty-five feet on Euclid avenue and extending eastwardly between parallel lines, at least two hundred and fifty feet, had no tracks upon it at the time of the assessment and trial. Defendant offered evidence showing that it had paid certain

special tax bills arising out of the same street improvements and which were assessed against its ground fronting Euclid and Audubon avenues, laid off and platted as lots, and upon which no railroad tracks were laid, and which was not used for railroad purposes.

The cause was tried without a jury. At the conclusion of the evidence, plaintiff asked the court to declare the law as follows: "The court, sitting as a jury, declares the law to be that the special tax bill offered and received in evidence makes a prima facie case for plaintiff, and that it being admitted that defendants are the owners in fee of the property described in said tax bill, the mere fact that railroad tracks are laid on portions of said ground and constitute a part of the main line of the Wabash Railway Company, between St. Louis and Kansas City, is no defense to plaintiff's cause of action"; which requested declaration of law the court refused to give, and plaintiff duly excepted.

At the instance of defendants, the court declared the law as follows: "The court gives, at the request of defendants, the instruction that, under the pleadings and all evidence, plaintiff is not entitled to recover," to the giving of which declaration of law plaintiff duly excepted.

At the same term of court judgment was rendered against plaintiff and in favor of defendant for costs, from which judgment plaintiff, after filing an unsuccessful motion for a new trial, appealed to this court.

¹⁷⁷ Section 5, article 10 of the constitution of Missouri provides: "All railroad corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock."

While a distinction is made between local assessments and taxes levied for general revenue purposes, in that an assessment for a local improvement is not a tax within the meaning of the constitutional provision requiring uniformity of taxation, it is in a sense a tax, not, however, for the purpose of sustaining the government, but imposed upon individual property upon the theory that such property receives a special benefit different from the general one

which the owner enjoys in common with others; in other words, an assessment for benefits.

That portion of section 14, article 6 of the amended charter of the city of St. Louis, under which the assessment in this case was made, is as follows:

“Special taxes for the improvements of streets, avenues and public highways shall be levied and assessed as follows: The total cost of grading and preparing the roadbed for the superstructure, placing foundation, curbing, guttering, roadway paving and crosswalks for the street embraced in the improvement, including all intersections of streets and alleys, shall be ascertained and one-fourth thereof shall be levied and assessed upon all the property fronting upon or adjoining the improvements, in the proportion that the frontage of each lot so fronting or adjoining bears to the total aggregate of frontage of all lots or parcels of ground fronting upon or adjoining the improvement, and the remaining three-fourths of the cost so ascertained shall be levied and assessed as a special tax upon all the property in the district to be defined and bounded ¹⁷⁸ as hereinafter provided, in the proportion that the area of each lot or parcel of ground or the part of such parcel of ground lying within the district bears to the total area of the district, exclusive of streets and alleys.

“The districts herein referred to shall be established as follows: A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. If the line drawn midway as above described would divide any lot lengthwise or approximately lengthwise, and the average distance from the midway line so drawn to the nearer boundary line of the lot is less than twenty-five feet, the district line shall in such case diverge to and follow the said nearer boundary line. If there is no parallel or converging street on either side of the street to be improved, the district line shall be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and

locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located. Provided, that if any property in a district established as herein provided is not liable to special assessment, the city shall pay the proportion of cost of the improvement which would have been assessed against such property. All of the property in the lots, blocks or tracts of land lying between the streets to be improved and the district lines established as above specified, shall constitute the district aforesaid."

It will be noted that this section expressly provides ¹⁷⁹ that "all the property" in the district to be defined and bounded as therein provided shall be subject to special taxes for the improvement of streets, avenues and public highways. It exempts no property from its operation, and if the defendant railway company is exempt from the taxes sued for, the burden rests upon it to show why it is so exempt.

Under the law of this state, as declared by the higher courts, it is well settled that special assessments for local improvements are a constitutional exercise of the taxing power (*Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 58 S. W. 434, 54 L. R. A. 592, 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879), and that "it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of local improvements, in whole or in part, upon the property in said district, either according to valuation or superficial area of frontage": *Webster v. City of Fargo*, 181 U. S. 394, 21 Sup. Ct. Rep. 623, 45 L. ed. 912; *Prior v. Buehler & Cooney Construction Co.*, 170 Mo. 439, 71 S. W. 205; *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 58 S. W. 434, 54 L. R. A. 592, 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. Rep. 921, 31 L. ed. 673; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 476. It has also been ruled that the provisions of article 10 of the constitution of Missouri, in regard to taxation, are applicable only to taxation in the ordinary acceptation of the term, and are inapplicable to these special assessments (*Farrar v. St. Louis*, 80 Mo. 379, and cases cited), and the same rule is held as to sections

3, 4 and 11, as to the uniformity of taxation: *Farrar v. St. Louis*, 80 Mo. 379; *City of St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713.

It is insisted by defendant that the tax bill sued on has no life except as a lien upon the specific property described therein, and that unless the lien sought to be enforced can attach to the specific property described in the petition and tax bill, there can be no recovery, because there can be no personal judgment.

In this state there is no personal liability of the ¹⁸⁰ property owner for special assessments, hence special taxes therefor are a charge against the property only. But it is contended that in the case at bar the lien would have to be enforced against a fractional part of a railroad right of way, which would be against public policy, and could not be done unless authorized by the legislature in language not to be doubted. Such is the doctrine announced in the case of *Sweany v. Kansas City R. R. Co.*, 54 Mo. App. 265, upon which defendant relies as sustaining its position. This decision is bottomed upon *Dunn v. North Missouri R. R. Co.*, 24 Mo. 493, *Abercrombie v. Ely*, 60 Mo. 23, *Schulenburg v. Memphis etc. R. R. Co.*, 67 Mo. 442, *Knapp v. Railroad*, 74 Mo. 378, and *Skrainka v. Rohan*, 18 Mo. App. 340, with respect to which it is said: "These were cases mainly for the enforcement of mechanics' liens against railroad bridges, depot buildings and the like, based on the general provisions of the mechanics' lien law allowing such liens for labor and materials furnished for all buildings, erections, improvements, etc. It was admitted that the erections of the railroad might come under the terms buildings or improvements of the mechanics' lien law, but yet it was said to be against the policy of the law to permit the enforcement of a lien against a detached portion of a railroad. The railroad is declared public in its nature; that if a portion of its right of way was thus allowed to be taken its capacity for serving the public would be destroyed; hence it was said 'that it is better to suffer a mischief which is peculiar to one than an inconvenience which may prejudice many': *Dunn v. North Missouri R. R. Co.*, 24 Mo. 493." Practically the same rule is announced in *McCutcheon v. Pacific R. R. Co.*, 72 Mo. App. 271.

Where words of general description are used in reference to taxation, such as "all property," they include everything

of that kind not expressly, or by necessary implication, excepted: *State v. Keokuk & N. R. R. Co.*, 153 Mo. 157, 77 Am. St. Rep. 704, 54 S. W. 559. So there can be no doubt that the ¹⁸¹ words "all property," as used in the city charter, include all railroad property; and railroad rights of way being private real property, they are, unless specially exempted, subject to assessment for local improvements under the terms of section 14 of article 6 of the amended charter of the city of St. Louis.

In the case of *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St. 159, the question was whether lands which had been condemned for railroad purposes, before the making of a street improvement, upon which lands the railroad track was built after the improvement was completed, and which lands crossed the improved street at right angles, were liable to assessment for the improvement. It was held that the assessment was valid. The court, after stating that railroad tracks are liable for general taxes, said: "If railroad tracks are taxable for general purposes, it is difficult to perceive why they should not be subject also to special taxes or assessments. The company, to advance its own interests, has seen fit to appropriate to its use ground within the corporate limits of the city of Toledo, and over which that city had the power of making assessments to defray the expenses of local improvements, and why should not the company be held to have taken it cum onere? A citizen would scarcely claim exemption because he had devoted his lot to uses which the improvement could not in any way advance, and we see no good reason why a railroad company should be permitted to do so. . . . But it is said that assessments, as distinguished from general taxation, rest solely upon the idea of equivalents, a compensation proportioned to the special benefits derived from the improvement, and that, in the case at bar, the railroad company is not, and in the nature of things cannot be, benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equivalent; but it by no means ¹⁸² follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. . . . No general rule, therefore, could be laid down which would do equal and exact justice to all. The legislature have not attempted so vain a thing, but have prescribed two different

modes in which the assessment may be made, and left the city authorities free to adopt either. The mode adopted by the council becomes the statutory equivalent for the benefits conferred, although in fact the burden imposed may greatly preponderate. In such case, if no fraud intervene, and the assessment does not substantially exhaust the owner's interest in the land, his remedy would seem to be to procure, by a timely appeal to the city authorities, a reduction of the special assessment and its imposition, in whole or in part, upon the public at large."

The same rule is announced in the case of *Peru & I. R. R. Co. v. Hanna*, 68 Ind. 562.

In the case of *Chicago v. Baer*, 41 Ill. 306, it is held that a street railway was subject to assessment for the improvement of the street upon which it was located.

In *Chicago City R. R. Co. v. Chicago*, 90 Ill. 573, 32 Am. Rep. 54, it was held that the right of way, right of occupancy, franchise and interest in a street railway company having a track in a street under a charter of the legislature, and under a contract with the city council, is a property, and as such is liable to be assessed for benefits in the widening of the street upon which it runs its cars the same as any other property benefited by the proposed improvement. To the same effect is *Cicero etc. R. R. Co. v. Chicago*, 176 Ill. 501, 52 N. E. 866.

In *Atchison etc. R. R. Co. v. Peterson*, 58 Kan. 818, 51 Pac. 290, it is held that the right of way and switch-yards of a railroad company are liable for an assessment to contribute to the expense of local improvements such as sewers and the ¹⁸³ like. The same rule is announced in *Illinois Central R. R. Co. v. East Lake Fork Drainage Commrs.*, 129 Ill. 417, 21 N. E. 925; *Wabash etc. R. R. Co. v. East Lake Fork Drainage Commrs.*, 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285.

It was held in the case of *Louisville & N. Co. v. Barber Asphalt Paving Co.*, 25 Ky. Law Rep. 1024, 76 S. W. 1097, that the right of way of the railroad company is liable to assessment for a street improvement: See, also, *Figg v. Louisville & N. Co.*, 116 Ky. 135, 75 S. W. 269; *Orth v. B. B. Park & Co.*, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251; *Commissioners of Chatham County v. Seaboard Air Line*, 133 N. C. 216, 45 S. E. 566; *Minneapolis etc. R. R. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103.

In *City of Ludlow v. Trustees of the Cincinnati Southern Ry. Co.*, 78 Ky. 357, suit was brought by the contractor, J. W. Rich, against the appellant and the trustees of the Cincinnati Southern Railway Company, to recover an assessment made by the city upon a lot belonging to the trustees, and abutting on the improved street. The trial court held that the lot was necessary for the operation and maintenance of the railway, and refused to subject it to the payment of the claim, and rendered judgment against the city. Upon appeal, the correctness of that ruling was questioned. The court said: "While assessments of this character, as distinguished from general taxation, rest upon the basis of benefits or presumable benefits to the property assessed, it is not essential to their validity that actual enhancement in value, or other benefit to the owner, shall be shown. The passage of the ordinances by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement, and of the question of benefit to the owners of abutting property: *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio, 159. Absolute equality in the distribution of such burdens cannot be attained. An approximation to equality is all that is possible, but in reaching this point the present or prospective use of the property cannot enter into the calculation." It was held by the court in that case that the city of Ludlow, ¹⁸⁴ having levied an assessment upon all real estate lying upon a certain street within its limits for the purpose of improving the street, a lot upon the street owned by the appellee, the Cincinnati Southern Railway Company, was subject to the assessment, and that the fact that the lot was the property of a railway company, and used for railroad purposes, furnished no more reason why it should be exempted from an assessment than if it belonged to a natural person.

In *Louisville & N. R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 Sup. Ct. Rep. 466, 49 L. ed. 819, it is said:

"There is a look of logic when it is said that special assessments are founded on special benefits and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the prem-

ises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise, rather than to answer, the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the constitution. Particularly it is important for this court to avoid extracting from the very general language of the fourteenth amendment a system of delusive exactness in order to destroy methods of taxation, which were well known when the amendment was adopted, and which it is safe to say that no one supposed would be disturbed. . . .

“That, apart from the specific use to which this ¹⁸⁵ land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we have already implied, a legislature is warranted in adopting. But if so, we are of opinion that the legislature is warranted in going one step further, and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use. On the question of benefits the present use is simply a prognostic, and the plea a prophecy. If an occupant could not escape by professing his desire for solitude and silence, the legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer cannot be regarded as absolute, even while the present use of the land continues—for no one can say that changes might not make a station desirable at this point; in which case the advantages of a paved street could not be denied. We are not called upon to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the fourteenth amendment of the constitution of the United States.”

Judge Elliott, in his work on Railroads, volume 2, section 786, says: "There is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessment. The question has been discussed in a great number of instances, and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that where the right of way receives a benefit from the improvements for which the assessment is levied, and there is no statute exempting the railroad company ¹⁸⁶ from local assessments, in clear and unequivocal terms, it is subject to assessment."

After discussing the adjudications which hold that the right of way of a railroad company may be assessed for local improvements, Gray, in his work on Limitations of Taxing Power and Public Indebtedness, section 1913, says: "On the other side are several respectable authorities. If they be closely examined, however, it will be found that the question was one of fact in the particular cases." The author then cites *City of Bridgeport v. New York etc. R. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Detroit etc. R. R. Co. v. Grand Rapids*, 106 Mich. 13, 58 Am. St. Rep. 466, 63 N. W. 1007, 28 L. R. A. 793; *Philadelphia v. Philadelphia etc. R. R. Co.*, 33 Pa. 41; *Junction R. R. Co. v. Philadelphia*, 88 Pa. 424; *Borough of Mt. Pleasant v. Baltimore & O. R. R. Co.*, 138 Pa. 365, 20 Atl. 1052, 11 L. R. A. 520; *Alleghany City v. Western Pa. R. R. Co.*, 138 Pa. 375, 21 Atl. 763; *Chicago etc. R. R. Co. v. Ottumwa*, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 763; *Chicago etc. R. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249; *New Jersey etc. R. R. Co. v. City of Elizabeth*, 37 N. J. L. 330; *Paterson & H. R. R. Co. v. City of Passaic*, 54 N. J. L. 340, 23 Atl. 945; *Boston v. Boston & S. R. R. Co.*, 170 Mass. 95, 49 N. E. 95. In each of these cases the question was one of fact—that is, absence of benefit to the property against which the assessment was made.

Nor is the right of way of defendant exempt from local assessment for benefits upon the ground that by section 14, article 12 of the constitution of Missouri, and sections 1127 and 1128 of the Revised Statutes of 1899, railways are declared to be public highways. In passing upon this question in *Gilfillan v. Eddy*, 123 Mo. 546, 27 S. W. 471, Gantt, P. J., speaking for the court, said:

“ ‘The declaration in the constitution that railways in this state are “public highways” in the connection in which it appears, obviously was not intended to throw them open as thoroughfares for pedestrians. Its object was to lay a foundation for certain kinds of legislative regulation of railways, but not to change the nature of the railroad property, or to divert it from the general purpose for which it was designed.’ Nor is it in any sense a warrant to use the cars of a railway company ¹⁸⁷ without the payment of reasonable tolls and in defiance of the management and regulation of the company. . . .

“Neither is the position of defendants true, that, because they are, by the constitution, ‘public highways,’ all of their property is exempt from special assessment, just as a public state or county road would be.

“The railroad of the company is not in this extreme sense the work of the state. The roadbed and the depot grounds are not public property managed by the company as an agent of the state. On the contrary, the company is a private corporation; its stock is the private property of its stockholders, who, as such, own its property. Because its function is to serve the public as a public carrier the state has invested it with the power of eminent domain and reserved to itself the power of visitation and regulation to protect the public so as to secure reasonable fares and tariffs and proper police regulation, but the stockholders, not the state, pay for its property and easements, and it becomes their property.

“The state taxes all of its property for general governmental purposes, so that, while for many beneficial purposes it is a ‘highway,’ it is misleading to speak of it as a highway in the strict sense of exemption from taxation, because this power is reserved to the state, and is constantly exercised over all of its property. The courts have differed widely in their opinions on this subject, even as to taxing the right of way for local improvements, but the case in hand does not call for an expression on the last proposition.”

If the right of way is taxable for general purposes, it is somewhat difficult to see why it may not be assessed for local improvements from which it is presumed to derive some special benefits not enjoyed by the general public.

¹⁸⁸ If an improvement is to be made, the benefit of which is local, the property benefited thereby should, upon every principle of justice, bear the burden. While the few ought not to be taxed for the benefit of the whole, neither should the whole be taxed for the benefit of the few. General taxation for a mere local purpose is manifestly unjust. It imposes a burden upon those not benefited by the improvement. The ordinance having expressly imposed the burden upon "all property" in the district specially benefited by the improvement, without exempting any, the question is whether an exemption ought to be implied by the courts in favor of the railroad right of way. We think not.

Our conclusion is that, according to the decided weight of authority and the better reason, the right of way of the defendant was properly assessed for local improvements, and that the declaration of law asked by plaintiff should have been given, and the declaration of law given at the instance of defendant refused. It follows that in so far as the case of *Sweany v. Kansas City R. R. Co.*, 54 Mo. App. 265, is taken as authority for the contention that the right of way of the defendant company cannot be charged with the lien of the special tax bill sued on for street improvements made under the charter of the city of St. Louis, it is overruled.

As to the proposition urged against this lien, that the roadbed or right of way of the defendant, or a part thereof, could not be sold under execution to satisfy any judgment which may be rendered in favor of plaintiff in this case, it is not necessary for us to express an opinion at this time. What we do hold is that, under the charter and ordinance, the tax bill sued on in this case is a lien against that part of the right of way of the defendant company described in the tax bill. We do not feel called upon to determine how such judgment can be enforced, but it is probable that counsel will be able, if necessary, to accomplish such result. As a general ¹⁸⁹ rule, "where there is a right, there is a remedy": 2 Dillon on Municipal Corporations, 4th ed., sec. 822; *McInerny v. Reed*, 23 Iowa, 410; *Lima v. Lima Cem. Assn.*, 42 Ohio St. 128, 51 Am. Rep. 809; *New York v. Colgate*, 12 N. Y. 140. And this case, we think, forms no exception to that rule. Our conclusion

is that the judgment should be reversed and the cause remanded.

It is so ordered.

Gantt, C. J., Valliant, Graves and Woodson, JJ., concur.

Lamm and Fox, JJ., dissent.

Property may be Subject to Special Assessments for street improvements, notwithstanding it is, because of its public or quasi-public character, exempt from general taxes: See the note to Board of Commissioners v. Ottawa, 33 Am. St. Rep. 410; Construction Co. v. Jasper County, 117 Iowa, 365, 94 Am. St. Rep. 301; In re Howard Avenue North, 44 Wash. 62, 120 Am. St. Rep. 973.

GROSS v. WATTS.

[206 Mo. 373, 104 S. W. 30.]

PRACTICE—Evidence After Close of Case.—If evidence in a cause is heard at one term of court and the cause is taken under advisement until the next term, it is no abuse of discretion to permit the introduction in evidence at that term of the certified copy of plaintiff's appointment as administrator, especially when this in no way injures the defendant. (pp. 674, 675.)

PRACTICE—Appointment of Administrator.—If the answer is a general denial, it is not necessary for the plaintiff to prove his appointment as administrator. It can only be questioned by a special plea in abatement. (p. 675.)

DEEDS—Acknowledgment—Residence.—A statute providing that the "place of residence" of the grantor in a deed be stated in the certificate of acknowledgment is directory merely. Hence the acknowledgment is sufficient although the grantor's residence is not stated. (p. 676.)

DEEDS—Acknowledgment—"Free Act and Deed."—If a certificate of acknowledgment of a deed recites that the grantor "duly acknowledged the execution of the same," the acknowledgment is sufficient, although it does not recite that the deed was executed as the grantor's "free act and deed." The statute relating to the latter clause is directory and not mandatory. (p. 676.)

VENDOR AND PURCHASER—Constructive Notice.—A purchaser is bound by constructive notice of all recorded instruments and the recitals therein lying within his chain of title; but a deed or instrument lying outside his chain of title imports no notice to him. (p. 677.)

VENDOR AND PURCHASER—Actual Notice of Mortgage—Evidence.—If the purchaser has actual knowledge of the existence of a mortgage on the premises before he purchases and pays for the land, such mortgage is admissible in evidence in an action to foreclose it. (p. 677.)

DEEDS—Forged—Effect of Notice and Knowledge.—If a grantee takes a deed for land from a grantor whose title is known to the former to rest in an erased, mutilated and forged deed, the grantee takes no interest in the land, whether the forged deed was recorded or not, or whether it was outside the chain of title or not. (p. 678.)

DEEDS, FORGED.—One can acquire no interest in land through a forged deed, whether or not he has notice of the forgery. (p. 678.)

LIMITATION OF ACTIONS—Conflict of Laws.—If the law of one state provides that a civil action upon any agreement, contract or provision in writing must be brought within five years, it only bars the remedy, and does not go further and extinguish the cause of action. Hence a suit to foreclose a mortgage on lands in another state brought in that state, where the period of the statute of limitations is longer, the mortgage being given to secure the payment of a note executed and made payable in the former state, is not barred by its statute of limitations. (p. 679.)

LIMITATION OF ACTIONS—Conflict of Laws.—Except in those cases where the cause of action is extinguished by the statute of limitations, the law of the forum governs. (p. 679.)

H. F. Millan, for the appellants.

Dysart & Mitchell, for the respondent.

³⁷⁷ **WOODSON, J.** This case originated in the circuit court of Macon county, and was instituted by plaintiff, administrator, against the defendants, having for its purpose—the first count—the foreclosure of a mortgage, executed and recorded, from William J. Watts and wife to Janet McQuacker, deceased, conveying the land described in the petition, and located in the county of Macon, state of Missouri, to secure their promissory note for the sum of five hundred dollars, due in five years from date, and five coupons attached thereto for thirty-five dollars each, which represent the annual interest on said note. The note and coupons after maturity bear interest at the rate of ten per cent per annum, and are payable at the First National Bank of Humboldt, Kansas. The plaintiff was duly appointed administrator of the estate of Janet McQuacker by the ³⁷⁸ probate court of Macon county, and he duly qualified, and he is now, and was at the time of the institution of this suit, acting as such. The other defendants are made parties to the suit because they claim some interests in the land, by mesne conveyances, through the defendant Watts, which will be more fully stated in the statement regarding the second count of the petition. The note and all the coupons were past due and unpaid at the time of the in-

stitution of this suit, except two or three of the coupons which had been paid prior to that date.

The prayer of the first count was for judgment for the amount of the note and the unpaid coupons, against the makers, a foreclosure of the mortgage and sale of the real estate to satisfy the judgment, and for execution against the makers for the excess, if any, over and above the proceeds of the sale of the land under the foreclosure proceedings.

The second count of the petition had for its object the reformation of a warranty deed, from W. W. Johnson and wife to defendant Wm. J. Watts purporting to convey the land in question, dated August 14, 1889. The facts regarding the transactions involved in the second count are best stated in the language of the petition itself, and they are as follows:

“That said mortgage [the one mentioned in the first count] was procured and negotiated by said defendant, E. A. Barber, to secure said loan to said Janet McQuacker; that the title of the said William J. Watts to the premises and lands described in said mortgage was a warranty deed duly executed and delivered to said William J. Watts, for a good and valuable consideration, by W. W. Johnson and his wife, Nellie C. Johnson, dated August 14, 1889, and duly acknowledged on said fourteenth day of August, 1889, before a notary public, in Allen county, and state of Kansas; that said warranty deed to said William J. Watts was by ³⁷⁹ said William J. Watts placed and left, with money sufficient for the record thereof, in the hands of said E. A. Barber, to be sent to the recorder of deeds for Macon county, Missouri, for record; that said E. A. Barber promised and agreed to send said warranty deed conveying said lands from said Johnson and wife to said William J. Watts, executed as aforesaid, to the recorder of deeds of Macon county, Missouri, for record in said office of recorder of deeds, together with the money deposited with him to pay for said recording; that by the fraud and deceit of said defendant, E. A. Barber, said warranty deed and conveyance was never sent by him to the recorder of deeds of said county of Macon, and was by fraud and deceit of the said defendant, E. A. Barber, never placed of record upon the records in the office of recorder of deeds of said county of Macon; that the said defendant E. A. Barber, intending

to cheat and defraud the said Janet McQuacker, without right, without authority, and corruptly and fraudulently, altered, erased and changed the grantee's name in the said warranty deed, conveying said premises from said W. W. Johnson and wife, Nellie C. Johnson, to said William J. Watts, by fraudulently erasing the name of the grantee, to wit, William J. Watts, and writing in place thereof as grantee in said deed his own name, to wit, E. A. Barber, which thereby became and was a forged instrument through which no subsequent party as grantee could acquire title; that the said E. A. Barber, further intending to cheat and defraud the said Janet McQuacker and the heirs of the estate of said Janet McQuacker, did, on the eighteenth day of April, 1901, fraudulently and wrongfully procure and have said warranty deed, altered and changed as aforesaid, filed and entered of record in the office of the recorder of deeds of Macon county, Missouri, and the same is recorded in book 136, page 582, in the said office of recorder of deeds for said county of Marion, changed ³⁸⁰ and altered as aforesaid; that said defendant, E. A. Barber, further intending to cheat and defraud the said Janet McQuacker, and the heirs of the estate of Janet McQuacker, did, on the ninth day of April, 1901, pretend to sell and convey the said land and premises to defendants, J. W. Bradigum, George F. Bradigum and Albert Best for eighteen hundred dollars by warranty deed, which was duly acknowledged on the ninth day of April, 1901, before a notary public of Greene county, Missouri, and the same was duly filed for record and recorded on the twentieth day of April, 1901, in the office of recorder of deeds for said county of Macon, in book 133 at page 118, the said defendant, E. A. Barber, warranting the said premises to be free and clear of all encumbrances, and that he had good title thereto, well knowing then and there that he had no title to said premises and that plaintiff's said mortgage was a valid and subsisting lien on said premises; that the said defendants, J. W. Bradigum, George F. Bradigum and Albert Best, well knowing and by ordinary diligence being able to well know the altered and changed condition of the deed filed and recorded as aforesaid in book 126 at page 582, in the office of recorder of deeds for Macon county, Missouri, as also that plaintiff's said mortgage was a valid and subsisting lien on said premises, did pretend to purchase said

premises from said defendant, E. A. Barber, and that said E. A. Barber never had any title to said premises, that afterward said defendants, J. W. Bradigum, George F. Bradigum and Albert Best, well knowing the facts as aforesaid, as to the title to said premises, did, on the sixteenth day of April, 1901, by their certain deed of trust, pretend to grant, bargain, sell, convey and confirm unto the defendant William R. Baird, as trustee for the defendant, Norah Wyatt, the said land and premises to secure to said Norah Wyatt the payment of a note of one thousand dollars, in said deed described, which deed of trust was recorded on ³⁸¹ the twentieth day of April, 1901, in the office of recorder of deeds of said county of Macon, Missouri, in book 129 at page 211, the said defendants, William T. Baird and Norah Wyatt, knowing well or by reasonable diligence being able to know well at the time of receiving said deed of trust all the facts above set out as to the state of title to said premises, and that said E. A. Barber never had any title to said premises, and that the said warranty deed of W. W. Johnson and wife as the same appears of record, in book 126 at page 582, changed, as aforesaid, as to the grantee therein, is a cloud upon plaintiff's title and endangers the collection of plaintiff's debt in proceeding to sell said land for the payment of said debt.

"Wherefore, plaintiff prays the court to reform and correct the record of the said warranty deed made by said W. W. Johnson and Nellie C. Johnson, his wife, recorded in said book 126 at page 582 in the office of recorder of deeds of said Macon county, and restore the name of William J. Watts as grantee in said deed as the same was when it was executed before the said E. A. Barber changed and mutilated the same, and for a decree and finding that the claim and right of all the defendants are subject to the right and lien of the plaintiff, and for costs therein expended, and for all other general and proper relief."

Defendants Best, Bradigums and Simmons filed their separate answer, and it is as follows:

"The defendants, Albert Best, J. W. Bradigum, Geo. F. Bradigum and Charles Simmons for separate amended answer herein to the first and second counts of plaintiff's petition deny each and every allegation therein except such as are hereinafter specifically admitted.

“They admit that they claim an interest in the lands described in plaintiff’s petition, and that the interest claimed by them is the full title in fee simple ³⁸² absolute to all of said lands; and they deny that either before or at the time of their purchase thereof they had any knowledge or information whatever that either Janet McQuacker or Wm. J. Watts had or claimed any interest in the lands described in plaintiff’s petition.

“That they purchased said lands from E. A. Barber and upon an abstract showing a perfect title in him and relying thereon; and upon the fact that the said E. A. Barber had been in the actual, open, notorious and continuous adverse possession of said land claiming title thereto against the world for more than ten years; that on the ninth day of April, 1901, the said Barber conveyed said lands by warranty deed to defendants, Albert Best, J. W. Bradigum and George F. Bradigum, and on the seventh day of September, 1901, the said J. W. Bradigum and John F. Bradigum conveyed their interests therein to defendant Best; and on the tenth day of September, 1901, defendant Best conveyed to defendant Simmons the following part of said lands, to wit: All that part of the west half of the northwest quarter of section 9, township 60, range 16, lying west of the Chariton river in Macon county, Missouri. That all of said conveyances were made upon full value paid by the grantee to the grantor and without any knowledge or information of any fraud practiced or attempted to be practiced by E. A. Barber, if any, or others, and without any knowledge or information of any claim or right of Janet McQuacker or William J. Watts, either legal or equitable.

“Defendant further states that by paragraph 4095 in article 3, chapter 80, volume 2, of the General Statutes of Kansas, 1889, it is provided as follows:

““(4095). Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterward:

³⁸³ “‘First. Within five years: An action upon any agreement, contract or promise in writing.’

“That upon the face of the note filed with the plaintiff’s petition as the cause of action and as a part of said note it is provided as follows: ‘The interest upon this note until

its maturity is shown by 'coupons bearing even date herewith, and if default be made in the payment of any interest coupon at maturity then the principal note shall immediately become due and payable and be collected by suit at law at any time after such default.' That by virtue of the terms of said note and coupons they became due December 1, 1896, and so defendants say that plaintiff's cause of action, if any, did not accrue within five years next before the bringing of this suit.

"Defendant further answering the second count of plaintiff's petition says that plaintiff's cause of action, if any, did not accrue within ten years next before the commencement of this suit."

Defendant, Barber, answered as follows:

"The defendant, E. A. Barber, for his separate answer herein, denies each and every allegation in plaintiff's amended petition in both counts thereof.

"Defendant further answering admits the sale and conveyance by him of the lands in dispute to defendants Albert Best, J. W. Bradigum and Geo. F. Bradigum; defendant specially denies that either Wm. J. Watts or Kate Watts ever had any title, right or interest legal or equitable in the lands in dispute.

"He denies that the deed dated fourteenth day of August, 1889, and recorded in book 126 at page 582 in the recorder's office of Macon county, Missouri, was made to Wm. J. Watts or Kate Watts; denies that their names or either of them were ever written in said deed as grantees therein.

"He denies that he ever erased the name of Wm. J. Watts or Kate Watts or either or both of them from ³⁸⁴ said deed; but asserts the fact to be that no other name than his own was ever written in said deed as grantee therein.

"He emphatically denies all charges of fraud, and further says that he and his grantees have been in the open, notorious and continuous adverse possession of the land in dispute for more than ten years before the commencement of this suit, claiming title thereto adverse to all the world.

"He further states that by paragraph No. 4095 in article 3, in chapter 80, volume 2 of the General Statutes of the state of Kansas, 1889, it is provided as follows:

" '(4095). Civil actions, other than for the recovery of real property, can only be brought within the following

periods, after the cause of action shall have accrued, and not afterward:

“ ‘First. Within five years: An action upon any agreement, contract or promise in writing.’

“That upon the face of the note presented and filed with plaintiff’s petition, and as a part thereof it is provided as follows: ‘The interest upon this note until its maturity is shown by coupons bearing even date herewith and if default be made in the payment of any interest coupon at maturity, then this principal note shall become immediately due and payable and be collected by suit at law at any time after such default.’ That by the provisions of said note and said coupons they became due and a cause of action accrued thereon December 1, 1896, and plaintiff’s action was not begun within five years thereafter; and so defendant says the said pretended cause of action and the pretended mortgage described in plaintiff’s petition are barred by said statute of limitation.

“Defendant further answering the second count of plaintiff’s petition says that the pretended cause of action stated in the second count of plaintiff’s petition ³⁸⁵ did not accrue within ten years next before the commencement of this suit.”

The reply of plaintiff is as follows:

“Now at this day comes the plaintiff and for reply to the answers of the defendants filed in this case, denies each and every allegation of the new matter therein contained.

“And further answering plaintiff says that at the time the cause of action accrued against the defendants and each and every one of them, each and every one of the defendants was out of the said state of Kansas, and that the defendant, William J. Watts, was out of the state of Kansas and has not been in the state of Kansas since the said cause of action accrued until the filing of this cause of action in this court, and that ever since the cause of action accrued the said William J. Watts has absconded and absented himself from his usual place of residence, and has concealed himself so that process of law in the state of Kansas and also in the state of Missouri could not be served upon him personally, and his whereabouts has been concealed and kept from his own relatives and family, since the — day of November, 1896, or thereabouts, and also during said time his whereabouts has been unknown to the holders and owners

of the note and mortgage herein sued upon. And having fully replied, the plaintiff prays for judgment as asked in the petition."

At the trial plaintiff introduced evidence tending to prove the following facts: That the mortgage sued on was duly executed and recorded. To the introduction of the mortgage in evidence the defendants objected, because not properly acknowledged, and was therefore improperly recorded, and imparted no notice to defendants. The certificate of acknowledgment is in the following words:

"State of Missouri, County of Barton—ss.

ss. "Be it remembered that on this 17th day of December, A. D. 1894, before me, a notary public, in and for said county, came Wm. J. Watts and Kate Watts (husband and wife) to me personally known to be the same persons who executed the foregoing instrument and duly acknowledged the execution of the same." Then follows the ordinary attesting clause of the notary.

The court overruled the objection, and the defendants duly excepted.

That the deed from W. W. Johnson and wife was executed in 1889, but was withheld from record for about eleven years; that the note, coupons and mortgage from Wm. J. Watts and wife were made in 1892—the note was made to Janet McQuacker, and by mistake the mortgage was executed to Mary McQuacker, and a corrected mortgage was made to Janet McQuacker, securing the note, and was dated December 27, 1894. The grantee in the first mortgage, Mary McQuacker, gave a quitclaim deed to Wm. J. Watts and wife, about the time the second mortgage was executed to Janet McQuacker. This loan was made at the request of defendant E. A. Barber; he negotiated the loan, and, when the mortgage was recorded, it was mailed to him at Humboldt, Kansas.

In reply to a letter written by counsel for plaintiff to E. A. Barber he answered as follows:

"Springfield, Mo., Feb. 15, 1898.

"Dysart & Mitchell, Macon, Mo.

"Gentlemen: Your favor of recent date inquiring about Wm. J. Watts and Kate Watts, his wife, received and noted.

"When the note and mortgage was given these parties lived at Golden City, Barton county, Mo. In the fall of

1896, just before the election, Wm. J. Watts mysteriously disappeared and has not been heard from since.

³⁸⁷ "I suppose that all that you can get or do will be to bring suit and get a decree foreclosing the mortgage and ordering the sale of the land and then sell it and bid it in for your clients. I believe I am in a position to help you out and give you as good or better a title to the land than you can get by suit, and so I make you this proposition, viz.: I will get you a good title to the land subject to the back taxes, provided I may have the timber on the land and a reasonable time, say one, two or three years to remove it from the land. I presume the land with the timber taken off ready for the plow is worth more than it is as it now stands. Or again, I will get you a good title to the land subject to the back taxes, provided your clients will enter into an agreement to reconvey to me free and clear of encumbrance at any time within three years that I may be able to raise and pay even \$500. In either way you will accomplish, I take it, all you can accomplish by a suit and with less expense to your clients.

"Let me hear from you on this.

"Very truly.

"E. A. BARBER."

Which letter was read in evidence.

The quitclaim deed given by Mary McQuacker to correct the mortgage given to her by mistake was also mailed to Barber, and was found attached to his deposition filed in this case.

That the coupons had been regularly paid as they fell due until the one maturing December 1, 1896; that the note and remaining coupons were due and unpaid at the time of the trial.

Wm. J. Watts and wife resided at Golden City, Missouri, and he mysteriously disappeared from his home shortly prior to the election in 1896 and has not been heard from since. He was a brother in law of said E. A. Barber.

That the deed from W. W. Johnson and wife, dated ³⁸⁸ August 14, 1889, was made to William J. Watts, and not to defendant, E. A. Barber; that it was filed for record April 8, 1901, and was acknowledged before George C. Barber, a notary, and a brother and partner in business with E. A. Barber; that the deed shows on its face that the name

of the grantee had been erased, and the name of E. A. Barber inserted in lieu thereof, in his own handwriting, which was in 1901, just prior to the sale of the land to defendants.

The deed also shows upon its face that the consideration and one and a half line of the habendum clause had been erased; that defendant Best saw the erasures were made before the name of E. A. Barber was inserted into the deed, which was a few days prior to the time he and the Bradigums purchased the land. The only evidence tending to show when these alterations were made is the testimony of E. A. Barber, and he states they were made in 1901.

The Best and the Bradigums purchased the land together, and they discussed the defects in the title and especially the erased portions; that defendant Barber wanted them to accept the erased deed and have their names written in it as grantees in the place of the name of the grantee which had been scratched out or erased, which they refused to do.

The two mortgages were dated and recorded in 1902 and 1904—the last one, the one upon which this suit is based, was recorded December 29, 1904.

Defendant Best testified that he saw the deed at La Plata, where it had been sent by E. A. Barber for inspection, and that he and the Bradigums refused to receive it, and that at that time the amount of the consideration expressed in the deed was eighteen hundred dollars, and that the name of the grantee had been scratched out.

That the attorneys for plaintiff have made all reasonable efforts to find and locate W. W. Johnson and Wm. J. Watts but failed to do so.

³⁸⁹ Defendant Barber procured his brother in law, Wm. J. Watts, and his wife to execute the mortgage to Janet McQuacker, who was a resident of Scotland, and secured the five hundred dollars from her for said Watts on said mortgage, which recites that Watts owned the land in fee; that he procured the quitclaim deed from Mary McQuacker, to whom the first mortgage had been made, to Wm. J. Watts and wife, and had it recorded, and in 1894 he had the mortgage in question executed and recorded, and all of these deeds were mailed to him at Humboldt, Kansas; all of which was prior to 1896, when his name was inserted in the scratched deed from W. W. Johnson and wife to Wm. J. Watts—that is, Watts' name was erased and his written in.

That the Bradigums had knowledge of the existence of the mortgage against the land before they and Best purchased it, and that plaintiff's attorneys were trying to collect it at that time, and that they relied upon the statements of E. A. Barber as to the condition of the title.

Best testified that he knew of the existence of this mortgage before he had paid for the land, and he got that information from the Bradigums.

The defendants' evidence tended to prove: That on August 14, 1889, W. W. Johnson was the owner of the lands in question, and that on that day he executed and delivered to E. A. Barber a deed for said lands in proper form, duly acknowledged, with the name of the grantee and the consideration left blank; that the amount of the consideration agreed upon was paid by Barber to Johnson, and that Johnson at the same time executed and delivered to Barber written authority to insert the amount of the consideration and the name of the grantee in the blank spaces left in said deed, and in 1896 he inserted eight hundred dollars as the consideration and his own name as the grantee in said deed; that the consideration paid by Barber for said deed was the assumption of a ³⁰⁰ mortgage debt of four hundred dollars against said land owed by Johnson to one Leitzbock and cancellation of a debt Johnson owed said Barber; that in 1901, when he had an opportunity of selling the land to Best and the Bradigums, he erased his name and the consideration clause in the deed and sent it to the Bank of Kirksville, and tried to close the deal with them by requesting them to take the deed and insert their names and the consideration in the deed. They refused to take the deed in that form, fearing Barber's wife would be entitled to dower, as they testified, in the land; that the deed was then returned to Barber, who thereupon reinserted in the deed his own name as grantee and the amount of the consideration as one thousand dollars, and then sent it to the recorder's office, at Macon, for record; that at the same time he sent to the Bank of Kirksville a deed from himself to the defendants Bradigums and Best, dated April 9, 1903, and by that deed conveyed the land to them, and that on the 20th of the same month he paid the Leitzbock mortgage.

At the time the defendants Bradigums and Best bought the land, Barber furnished them an abstract of title made

by an abstractor at Macon, which showed a good title in Barber, but did not show the mortgage sued on; and the abstractor testified that the reason why it did not appear in the abstract was because it did not appear in the chain of title; that the deed from W. W. Johnson to E. A. Barber was not recorded until about the time he sold the land to Best and the Bradigums.

The mortgage provided that if the interest was not paid when due the principal note should become immediately due and payable.

Defendants introduced in evidence the statutes of limitation of Kansas, which are pleaded in the answer.

At the close of the evidence it was agreed and noted of record that the cause was submitted to the court and ³⁹¹ would be argued the next term of the court. At the next term of the court, the court, over the objection of the defendants, permitted plaintiff to introduce in evidence a certified copy of the order of his appointment as administrator of the estate of Janet McQuacker, deceased, to which action of the court defendants duly excepted.

The court found the issues for the plaintiff and rendered judgment in his favor, on each count as prayed for in the petition. The defendants filed their motion for a new trial, which was, by the court, overruled, to which action of the court defendants duly excepted, and have appealed the cause to this court.

1. The first assignment of error made by appellants is, the action of the court in receiving in evidence a certified copy of the order of the probate court of Macon county, appointing respondent administrator of the estate of Janet McQuacker, after the close of the case. The evidence in the cause was heard at one term of the court and taken under advisement until the next term, at which time the certificate was offered and received in evidence. The order continuing the cause to the next term preserved the jurisdiction of the court over the entire case, and it possessed the same jurisdiction to act in the cause that it possessed at the previous term. There was no leakage or loss of power or jurisdiction of the court during the interim, nor during the passage of the cause from the one term to the other.

This court has repeatedly held that evidence may be introduced after a case is closed and the judgment will not be reversed on that account unless it appears to the satis-

faction of this court that the trial court abused its discretion in that regard, and that injury resulted as a consequence thereof to the complaining party: Fullerton v. Fordyce, 144 Mo. 519, 44 S. W. 1053; Joplin Waterworks Co. v. Joplin, 177 Mo. 496, 76 S. W. 960.

The proof of the appointment of Gross administrator ³⁹² of the McQuacker estate was a formal matter, and did not in any manner injure the defendants.

Independent of the rule just stated, we may add that under a general denial it was not necessary for plaintiff to prove his appointment as administrator. A general denial puts in issue only the merits of the case. If defendants desired to question the appointment of plaintiff, they should have done so by a special plea in the nature of a plea in abatement. This is the conclusion reached by Valliant, J., in a very able and carefully considered case, in which he reviews all the authorities upon that subject: Baxter v. St. Louis T. Co., 198 Mo. 1, 95 S. W. 856.

It must, therefore, be held that there was no error in the action and ruling of the trial court in admitting in evidence the certified copy of the order appointing plaintiff the administrator of the estate of Janet McQuacker, deceased.

2. The next contention of the appellants is, that the court erred in admitting in evidence the mortgage sought to be foreclosed. There is no question raised as to the genuineness of the signatures to the mortgage or that it was not actually recorded and properly indexed; but they do question the sufficiency of the acknowledgment, and contend that it was on that account improperly recorded, and that it imparted notice to no one.

Section 913 of the Revised Statutes of 1899 provides that "The certificate of acknowledgment shall state (1) the act of acknowledgment; (2) that the person making the same was personally known to the officer granting the certificate to be the person whose name is subscribed to the instrument as a party thereto; and (3), or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate." The section provides further that the certificate of the officer taking the acknowledgment may be in the following form:

³⁹³ "On this — day of —, 18—, before me personally appeared A B (or A B and C D) to me known to be the person (or persons) described in and who executed

the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed."

If we look at the certificate of acknowledgment attached to this mortgage, we find that it states (1) that Wm. J. Watts and Kate Watts (husband and wife) acknowledged the execution of the deed; (2) that they were personally known to him to be the same persons who executed the foregoing instrument; and (3) that while their names are stated in the certificate, their places of residence are not stated, without the caption of the certificate may be considered and taken to be their residence; but it will be seen by looking at the form of the certificate, prescribed by the statute, that it does not require the residence of the makers to be stated or given.

By construing the entire section together, we are clearly of the opinion that the first portion of the section is only directory, and not mandatory. In the form of certificate prescribed by the section, we find that it concludes with these words, "and acknowledged that he (or they) executed the same as his (or their) free act and deed." The certificate of acknowledgment to the mortgage in question does not state that the grantors executed it as their "free act and deed." The statute does not require this form to be used by the officer taking the acknowledgment, but provides that it may be used. The first clause of the section provides, "The certificate of acknowledgment shall state the act of acknowledgment," but does not require it to state that they executed the same as their "free act and deed." The certificate of acknowledgment to this mortgage complies with the first clause of that section, and a substantial compliance is all the law requires: *Alexander* ³⁹⁴ v. *Merry*, 9 Mo. 514; *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776; *Wilson v. Quigley*, 107 Mo. 98, 17 S. W. 891; *Hughes v. McDivitt*, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756; *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965.

Appellants also insist that the mortgage should not have been admitted in evidence as imparting notice to them because it did not form a link in the chain of title to the land described therein. This presents a more serious question than the one first disposed of. The record title was in W. W. Johnson, and he conveyed his title to Wm. J. Watts, but this deed of conveyance was never placed upon record. E. A. Barber erased the name of Watts therefrom and withheld

it from record. While the title was in this condition the mortgage from Wm. J. Watts and wife to Janet McQuacker was executed and placed on record. Under the condition of the title, an investigation of the Johnson title would not reveal the Watts-McQuacker mortgage, because the record of that title did not disclose the deed of conveyance from Johnson to Watts, or in any other manner connect Watts with that title.

The law of this state is well settled that a purchaser is bound with constructive notice of all recorded instruments and the recitals therein lying within his chain of title; but a deed or instrument lying outside of the purchaser's chain of title imports no notice to him: *Tydings v. Pitcher*, 82 Mo. 379; *Crockett v. Maguire*, 10 Mo. 34; *Digman v. McCollum*, 47 Mo. 372; *Burke v. Beveridge*, 15 Minn. 205; *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543; *McDonald v. Quick*, 139 Mo. 484, 41 S. W. 208; *Kansas City & A. R. R. Co. v. View*, 156 Mo. 608, 57 S. W. 555.

According to the rule announced in the foregoing cases, the action of the trial court in admitting the mortgage in evidence for the purpose of imparting notice to defendants of its existence was erroneous. But we are unable to see how that error did or could have injured appellants' rights in any manner whatever, because all the defendants had actual notice of ³⁹⁵ the existence of that mortgage before they purchased and paid for the land. One Bradley told the Bradigums about it, and Best testified that he had made the contract for the purchase of the land before he heard of the mortgage, but that he had not paid for the land when he received that notice, and Barber had actual knowledge of the mortgage, because he himself negotiated the loan and had the mortgage recorded.

In deciding a similar question *Sherwood, J.*, used this language: "And (2) the further fact, that it was established beyond question that the defendants were purchasers with full and actual notice of plaintiff's claim. Such notice countervails the effect of registry and dispenses with it": *Hoge v. Hubb*, 94 Mo. 489, 7 S. W. 443; *Bartlett v. Glasscock*, 4 Mo. 62; *Vaughn v. Tracy*, 22 Mo. 415; *Sensendenfer v. Kemp*, 83 Mo. 581; *Vaughn v. Tracy*, 25 Mo. 318, 69 Am. Dec. 471; *Speck v. Riffin*, 40 Mo. 405; *Foster v. Breshears*, 55 Mo. 22; *Harrington v. Fortner*, 58 Mo. 468; *Wilson v. Kimmel*, 109

Mo. 260, 19 S. W. 24; Jackson v. Burgott, 10 Johns. 457, 6 Am. Dec. 349.

3. The defendants claim title to the land in controversy through and under the erased, mutilated and forged deed from Johnson to E. A. Barber. Under the facts as disclosed by the record in this case, it goes without saying that Barber fraudulently changed that deed by erasing the name of the grantee, William J. Watts, and by inserting his own in lieu thereof, for the purpose of defrauding Janet McQuacker out of the five hundred dollars he loaned for her. All the defendants saw the deed and inspected it or talked to those who had seen and inspected it regarding its condition, and refused to permit their names to be inserted into that deed as grantees in the place where the name of the grantee had been erased, but required E. A. Barber to insert his own name as the grantee and then took a deed from him to the same land. All of them had actual notice of the mutilated condition of the deed and sufficient ³⁹⁶ notice to have put a reasonably prudent person upon inquiry. If this information acquired by defendants had been properly followed up, it would have uncovered the rascality and forgery of Barber. They have no one to blame but themselves for their carelessness and credulity in this matter.

But so far as this branch of the case is concerned, that principle of law which holds that unrecorded deeds and instruments which are outside of the chain of title do not impart constructive notice to purchasers has no application to forged instruments. "It would be a dangerous doctrine indeed to hold that one by forging a deed from his neighbor to himself and putting it upon record could then, by conveying to a third party having no notice of the forgery, confer upon the latter a good title merely because the record showed the title in the forger. If such were the law, no man's life would be safe. The principles of justice and public policy alike forbid the adoption of such a rule": *Pry v. Pry*, 109 Ill. 466, and cases cited; 2 Jones on Law of Real Property and Conveyancing, sec. 1353.

According to this rule none of the grantees claiming through E. A. Barber acquired any right, title or interest in or to said land, and it is wholly immaterial whether they had notice of the forgery or not.

4. The last insistence of the appellants which is worthy of consideration is that the note sued on was barred by the

statutes of limitation before this suit was instituted. Their contention is this, that the note and mortgage were executed and made payable in the state of Kansas, and that fact constituted the note a Kansas contract and subjected it to her laws of limitation, which was at that time five years. The note having been barred before the institution of this suit, the mortgage securing it must also be barred, so they contend.

The statute of Kansas which appellants plead is as follows:

~~397~~ "(4095). Civil actions other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterward.

"First. Within five years: An action upon any agreement, contract or promise in writing."

This statute was before the Kansas City court of appeals for consideration in the case of *Morgan v. Metropolitan St. R. R. Co.*, 51 Mo. App. 523. It was there held that said statute only barred the remedy and did not go further and extinguish the cause of action.

We are of the opinion that the conclusion reached by that court is clearly the true meaning of that statute. That being true, then the debt evidenced by the note and mortgage in question was still a valid and subsisting claim at the time this suit was instituted. Except in those cases where the cause of action is extinguished by the statutes of limitation, the laws of the forum apply: *Carson v. Hunter*, 46 Mo. 467, 2 Am. Rep. 529; *Lyman v. Campbell*, 34 Mo. App. 213; *Williams v. St. Louis & S. F. R. R. Co.*, 123 Mo. 537, 27 S. W. 387,; *King v. Lane*, 7 Mo. 241, 37 Am. Dec. 187; *Stirling v. Winter's Exr.*, 80 Mo. 141.

In the case at bar the note and first mortgage were dated and executed on December 1, 1892, and the second mortgage, correcting the first, was executed December 27, 1894, and this suit was filed sometime prior to September 6, 1902, the latter being the day on which the amended petition herein was filed, which was less than ten years after the execution of the note and the first mortgage and within eight years from the execution of the second.

In this state actions upon promissory notes and other written instruments for the payment of money, whether sealed or unsealed, are not barred by the statutes of limitation before the expiration of ten years from and after their execution,

and suit may be brought ^{and} and maintained upon any such instruments at any time within that ten years: Rev. Stats. 1899, secs. 4271, 4272.

According to the provisions of these statutes, the cause of action was not barred at the time the suit was brought.

It is not out of place to here add that the undisputed evidence in this case shows that Wm. J. Watts and his wife were residents of Golden City, Barton county, Missouri, at the time of the execution of the note and mortgages in question, and there is not a scintilla of evidence tending to show that either of them ever resided in the state of Kansas. The record also shows that Janet McQuacker was at all times mentioned in the record a resident of Scotland, Great Britain. Under that state of facts the statutes of limitation of Kansas have no place in this case and are wholly inapplicable thereto: *Williams v. St. Louis & S. F. R. R. Co.*, 123 Mo. 573, 27 S. W. 387.

There are some other minor points presented and discussed by counsel for both appellants and respondent, but their consideration would not lead to a conclusion different from the one herein announced.

The judgment of the circuit court was for the right party, and it is therefore affirmed.

All concur.

Defects in Acknowledgments which do not invalidate the instrument are discussed in the note to *Trerise v. Bottego*, 108 Am. St. Rep. 525.

The Effect of Unauthorized Alterations in written instruments is the subject of a note to *Burgess v. Blake*, 86 Am. St. Rep. 80.

The Statute of Limitations of the Forum governs, in case of a conflict of laws, unless the statute is regarded as extinguishing the debt and not merely barring the remedy: See the note to *Menzell v. Hinton*, 95 Am. St. Rep. 660; *Arp v. Allis-Chalmers Co.*, 130 Wis. 454, 118 Am. St. Rep. 1036.

STATE v. ADCOCK.

[206 Mo. 550, 105 S. W. 270.]

PHYSICIANS—Issuance of License.—If a statute requires the issuance of a license to an applicant to practice medicine upon a proper showing, it is not within the power of the state board of health to arbitrarily refuse it. (pp. 684, 685.)

MANDAMUS to Control State Board of Health—License to Practice Medicine.—If a state board of health, against all the rules and the great weight of evidence, arbitrarily refuses to grant a license to an applicant to practice medicine, mandamus will lie to compel it to do so. (p. 685.)

MANDAMUS to Control State Board of Health.—A state board of health is clothed only with administrative and discretionary powers, and an unwarranted exercise of that discretion is a subject for review by mandamus. (p. 685.)

MANDAMUS to Control State Board of Health—License to Practice Medicine.—If a state board of health, against the great weight of the evidence, arbitrarily refuses to grant a license to an applicant to practice medicine, there is no remedy by appeal, and the only remedy is by mandamus. (p. 685.)

PHYSICIANS—Application for License—Power of State Board of Health.—Upon an application for a license to practice medicine, the state board of health acts ministerially merely, and if the proper conditions exist and a proper showing is made, the board has no discretion in the matter, and the license must be granted. (p. 686.)

MANDAMUS to Control State Board of Health.—A state board of health has merely administrative and ministerial duties to perform, and cannot act arbitrarily, nor against the great weight of the positive testimony, upon a given question, and if it does so act, the person aggrieved has redress by means of the writ of mandamus. (p. 686.)

J. A. McLane, for the relator.

H. S. Hadley, attorney general, and N. T. Gentry, assistant attorney general, for the respondents.

552 GRAVES, J. Relator, Dr. A. S. McCleary, graduated from the Eclectic Medical University of Kansas City, Missouri, March 24, 1904, and received his diploma therefrom on that date. This school is duly incorporated under the laws of Missouri, and has a four years' course of study. He claimed to have been a matriculant in said school in the fall of 1900, and therefore prior to March 12, 1901. On or about November 27, 1906, he presented to relators all the evidence required by the act approved March 21, 1903, to entitle him to a license from respondents, who constitute the state board of health, to practice medicine and surgery in the state of

Missouri. Relator on said date tendered to respondents the required fee under the statute, but respondents refused to grant to relator a license, and thereafter relator applied to this court for a writ of mandamus, and the alternative writ was duly granted. Among other things stated in the alternative writ we find:

“That said board of health of the state of Missouri has failed, neglected, and still fails and neglects, to issue to relator a license to practice medicine in the state of Missouri; that said board is composed of seven physicians, five of whom are allopath physicians; that said board is biased and prejudiced against relator; that relator is a matriculant and graduate of an eclectic school of medicine; that a majority of the members of said board of health belong to the regular or allopathic school of medicine, a school or system of medicine entirely different and opposed to the school or system of medicine of which relator is a matriculant and graduate; that the school of medicine of which a majority, or five, of said members of said board belong, are opposed and averse to giving relator a license to practice medicine in the state of Missouri, because relator is a matriculant and graduate of a system of medicine differing from ⁵⁵³ the system of medicine of which a majority of the members of said board of health are graduates.”

The return of respondents is in this language: “Now, on this day, come the respondents, and for return to the alternative writ herein, admit that it is true as alleged in the alternative writ, that the respondents constitute the state board of health of Missouri, having been duly appointed and qualified as members of said board; they admit that on the twenty-seventh day of November, 1906, the relator appeared before respondents, as members of said board of health, in Kansas City, Missouri, and tendered to them the sum of fifteen dollars, the fee allowed by law; they admit that the relator then and there produced satisfactory proof of his good moral character; and they admit that he then and there produced satisfactory evidence that he graduated from the Eclectic Medical University on March 24, 1904, and received a diploma, properly signed by the officers and professors in said university, which diploma was dated March 24, 1904. But the respondents deny that the relator produced to them satisfactory proof that he matriculated in the Eclectic Medical University, or in the medical department of any univer-

sity, school or college prior to March 12, 1901. And for further return respondents say that relator produced before them at said time and place a paper which purported to be signed by an officer of said Eclectic Medical University and which purported to be a receipt for the matriculation fee of relator in said university and which purported to be signed November 12, 1900; that upon careful inspection of said receipt with a microscope, it was discovered that the same was originally dated November 12, 1901, and that the same had been changed to 1900. That the relator produced before them certain affidavits, purporting to have been signed ~~554~~ by teachers in said university, which affidavits stated that the relator had attended lectures in said university in the fall of 1900. That they examined certain records and papers of said university, but failed to find the name of relator in the list of scholars of said university for the year 1900. Respondents further say that they are not satisfied with the evidence so produced before them that the relator matriculated as a student in said university prior to March 12, 1901; and upon the evidence so produced, declined to issue a license to relator to practice medicine in Missouri. And further, respondents deny each and every other allegation in the alternative writ. Wherefore, the premises considered, respondents pray that no peremptory writ of mandamus issue herein, that the alternative writ be discharged, and that respondents be awarded their costs herein."

The reply to this return is a specific denial of all new matter in the return.

Honorable A. L. Cooper was appointed commissioner by this court to take the testimony, and after so doing, he has made a report in which there is a finding both of fact and law, accompanied with all the testimony in the case. The report is one evidently prepared with great care. The report concludes as follows:

"My findings and conclusions are, therefore, as follows:
"1. The relator did matriculate in the Eclectic Medical University of Kansas City, Missouri, prior to March 12, 1901, and established that fact by the great weight of evidence, both at the hearing before the board of health and before me.

"2. The board of health did not give to the relator's evidence the weight and consideration to which it was entitled

and in that respect acted without due regard to the legal rights of relator.

"3. I find, and the pleadings admit, that he had ⁵⁵⁵ complied with all other conditions required by the statute.

"I therefore respectfully recommend that the peremptory writ prayed for be issued."

We have gone through the evidence, and the conclusions of the commissioner, as to the facts, are the only ones which could have rightfully been reached. As to the law, we will discuss that in the course of the opinion.

An examination of this record shows that the overwhelming evidence, both before the commissioner and previously before the state board of health, is to the effect that relator had matriculated in the Eclectic Medical University of Kansas City, Missouri, prior to March 12, 1901. All other requisites for a license stand admitted by the return. In other words, the only disputed question is, Was the applicant, Dr. McCleary, a matriculant in said school prior to March 12, 1901? If he was, he was entitled to his license; if he was not, then it was properly refused.

Relator bottoms his right to a license on the act of 1903, approved March 21, 1903, in words as follows: "It is not intended by this act to prohibit gratuitous service to and treatment of afflicted and this act shall not apply to commissioned surgeons of the United States army, navy and marine hospital service, nor to any student who has matriculated in a medical college on or prior to March 12, 1901, and it shall be the duty of said board of health on receiving a fee of fifteen dollars from said student to issue to him a license to practice medicine when said student presents a diploma from any medical college of this state."

Under the facts of this case and under this law the only thing for respondents to do was to rightfully ⁵⁵⁶ determine the question as to whether or not the relator was a matriculant in this school prior to March 12, 1901. On this question the respondents held adversely to relator. We are, therefore, required to face the question as to whether or not this finding of the respondents is final and not subject to review in this court. Respondents claim that they exercised their discretion on this question and that their judgment is final. If so, there is an end to this cause. But in this we do not assent to the contentions of respondents. Discretions must always be reasonably exercised. As to whether or not they

are reasonably exercised is a question for the courts. The statute requires the issuance of a license upon a proper showing and it is not within the power of the board of health to arbitrarily refuse it. In the case at bar the sole and only question for respondents to determine, under the admissions in the pleadings before us, was as to whether or not the relator had matriculated in the medical college mentioned above prior to March 12, 1901. Now, if the board of health, against all the rules of evidence and against the great weight of the evidence, as evinced by this record, arbitrarily refused to grant the license, will mandamus lie to compel them to do so? This is the sole contention of respondents. They claim that they have exercised their best judgment, and having done so the incident is finally closed. Does the law place in the hands of administrative boards such arbitrary power? We think not. If so, the courts are not open to the aggrieved, if such there be, and this case is wrongfully here. If so, such boards can arbitrarily refuse any applicant the rights prescribed by the law, and he is without remedy. If so, such a board can hear the evidence, and against all of the evidence, place its ipse dixit, and refuse to the applicant the privileges granted by the law. Such a doctrine is not consonant with reason, and is not the law. Grant ⁵⁵⁷ it, for the purposes of this case, that these boards are clothed with discretionary powers, yet an unwarranted exercise of that discretion is a subject matter for review. They are not judicial bodies: *State v. Goodier*, 195 Mo. 551, 93 S. W. 528. In that case this court said: "The duties of the board are of an administrative or ministerial character, and therefore as long as its acts are within the scope of the exercise of a reasonable discretion it is free to act: *State v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565. If, perchance, through a misunderstanding of the law, the board should refuse to perform a given duty, the writ of mandamus will right the wrong: *State v. Lutz*, 136 Mo. 633, 38 S. W. 323. But the writ of prohibition does not go against such a body; it goes only against a court or tribunal exercising judicial functions. We have very recently held that a writ of prohibition would not go against the board of election commissioners, because although it exercised a large discretion (in the case there under review having to investigate and find from the evidence and decide which of two antagonistic sets of claimants was entitled to recognition as the lawful committee of a po-

litical party), yet it was the act of a ministerial and not a judicial body and the act to be performed was not a judicial act: *Kalbfell v. Wood*, 193 Mo. 675," 92 S. W. 230.

But even if it were a judicial tribunal, and its discretion was arbitrarily exercised, such action would be subject to review. We have always so held in matters of granting a continuance and similar matters, and a citation of cases would be superfluous. In the case at bar there is no remedy by appeal, and the only remedy is the one invoked in this case.

But beyond all this, and decisive of this case, the board acts ministerially in a matter of this kind. If the conditions exist, the license must be granted. If the conditions exist there is no discretion, but the license ⁵⁵⁸ must be issued. If the board cannot act judicially, as was held in the *Goodier* case, *supra*, this case resolves itself into the plain proposition, Do or do not the conditions exist? If so the license must go. The great weight of the evidence shows that the relator had matriculated prior to March 12, 1901, and such being the case, the peremptory writ of mandamus must go.

We conclude by saying that boards of this character, having merely administrative and ministerial duties to perform, cannot act arbitrarily, nor against the great weight of the positive testimony upon a given question, and if they do so act, there is redress for the party aggrieved, by an action of this kind.

From these views it follows that the peremptory writ should go, and it is so ordered.

All concur.

On Mandamus Against a State Board of Health to compel the issuance of a physician's license to an applicant, see the note to State v. Gardner, 98 Am. St. Rep. 876.

STATE v. MATHIS.

[206 Mo. 604, 105 S. W. 604.]

GAMING—Keeping Poker-table.—Under a statute prohibiting the setting up or keeping “any kind of gambling table or gambling device, adapted, devised, and designed for the purpose of playing any game of chance for money or property,” and the inducing, enticing or permitting “any person to bet or play at or upon any such gaming-table or gambling device,” it makes no difference whether the table on which the game of poker is played is a gambling device or not; and if it is a table adapted, devised, or designed for the purpose of playing any game of chance for money or property, and the defendant permitted any person to bet upon and play poker upon such table, he is guilty of a violation of the statute. (p. 692.)

GAMING—Keeping Poker-table—Evidence.—That a poker-table, so called, is adapted and designed for the purpose of playing games of chance is clearly shown by the fact that games of poker are played thereon. (p. 692.)

GAMING—Keeping Poker-table.—Although Cards may be Necessary to be used in conjunction with a table or other device, to play the game of poker, it is none the less a gambling-table or device when used in conjunction with cards for the purpose of playing poker for money or property. (p. 692.)

GAMING—Keeping Gambling Table—Craps.—Whether a table used is specially adapted, devised and designed for the purpose of playing the game called craps, for money or property, is immaterial, so long as it is used for such purpose and persons are permitted to bet at or play upon such table. It then becomes a gambling table within the meaning of the statute. (p. 693.)

Clay & Sheppard, for the appellant.

H. S. Hadley, attorney general, and N. T. Gentry, assistant attorney general, for the state.

606 **BURGESS, J.** At the April term, 1906, of the circuit court of Newton county, the defendant was convicted of the crime of setting up and keeping divers gaming-tables and gambling devices, to wit, two poker-tables and one crap-table, which were adapted, devised and designed for the purpose of playing games of chance for money and property. The conviction was under the second count of an indictment charging defendant with said offense, and the punishment assessed was five years in the penitentiary. After filing unsuccessful motions for a new trial and in arrest of judgment, the defendant appealed.

The evidence on the part of the state tended to prove that there was a building known as the Belmont Block situated in the city of Neosho, Newton county, Missouri, and that in

the summer of 1905 there were two upstairs rooms in said building which defendant occupied and called his office. One witness, Lou Ellis, did some work for the defendant and visited his home for the purpose of collecting the money owing him for said work. Defendant told him to come to his office and get paid. Witness went to said Belmont Block building, where he was directed to the office of the defendant. He found the door locked, but the defendant unlocked it and admitted him. There was another ⁶⁰⁷ man besides the defendant in the room. In that room were three tables, one square-shaped and two round tables, each having a canvas cover. After being paid the amount of his bill, Ellis engaged in a game of poker with defendant and the other man, and remained there seven hours. Ellis bought five dollars' worth of poker chips from the defendant, paying him money therefor, and after losing on the game he again bought five dollars' worth of chips. Losing the second time, he bought ten dollars' worth of chips from the defendant, which he also lost. At various times during the progress of the game Ellis heard knocks at the door. Each time the defendant got up, went to the door and peeped through the keyhole, but did not allow anybody to enter. The poker-table at which Ellis and his companions played had a drawer in it and also a slot on the top through which slot chips were dropped into the drawer by players at the game, the chips dropped through becoming the operator's "rake-off." Witness Ellis also testified that during the game that they there played defendant sat on one side of the poker-table, about where the drawer was, and that Ellis and the other man sat on the other side of the table opposite the defendant. That the defendant kept the chips and decks of cards in the drawer, and that the defendant had charge of the decks and also charge of the chips. He further testified that they used the chips to bet with instead of money, and that after the game was over the chips were cashed, the defendant cashing the same.

Elbert Oliver, a boy of nineteen, testified that he knew the defendant and had visited his place of business in the Belmont Block along in the summer of 1905, and that he met the defendant and several others in those upstairs rooms at night. He further testified to the fact that the door was locked and that some one on the inside responded to his knock. On that night ⁶⁰⁸ this witness, the defendant and

others played a game of craps on one of these tables, using dice and betting money.

John Pickins, a boy of fifteen, testified that he, too, visited the defendant's apartments in the Belmont Block, and saw men shooting craps there on a table, using dice. He said nobody invited him to go up there; he "just followed the gang." After the proper knock was made on this door, some one from within unlocked it and let them in. This witness lost thirty-five cents on the game of craps, which he said was played on a table that had black oilcloth, or something of that kind, over the top.

The city marshal of Neosho, Mr. B. J. Peraman, and Sheriff John B. Beavers, raided the Belmont Block one night in the summer of 1905, but before forcing an entrance they climbed up in a chair and peeped in over the transom. They saw the defendant, Elbert Oliver, Claude Flemming and others in the room gambling and shooting craps. The defendant was sitting on one side of the table and the others were sitting on the other side of the table, facing him, rolling dice and throwing money on the table. There were three tables in the room and each one had a cloth cover. Two of the tables were covered alike, but one had a white cover. After watching this for a little while, the officers went away and came back later that night. By this time the defendant and his associates were making considerable more noise. The officers heard the dice and money falling upon the table, and the defendant and two of his friends were seen standing around the tables. In the drawers of these tables were found thirteen decks of cards and a number of poker chips. The sheriff called out, "Boys, I see you," and asked that the door be opened. After making further demands for the door to be opened, and kicking on the door several times, it was unlocked, and the ~~609~~ sheriff and marshal entered. There was only one man in the room where the tables were. But on going through into another room and back into a closet, the defendant and several of his friends were found. Two of the tables were round and one was a square table. The round tables were what were known as poker-tables. The other table was the kind used to shoot craps on.

The defendant offered no evidence, but asked for an instruction in the nature of a demurrer to the evidence introduced by the state, which instruction the court refused to give, and defendant excepted.

The indictment charges that on the — day of September, 1905, Grant Mathis, in the county of Newton and state of Missouri, did unlawfully and feloniously set up and keep divers gaming-tables and gambling devices, to wit, two poker-tables, commonly so called, one crap-table, commonly so called, upon which dice and cards were used, which said gaming-tables and gambling devices were adapted, devised and designed for the purpose of playing games of chance for money, property and poker chips, and did then and there unlawfully and feloniously entice and permit divers persons, to the grand jury unknown, to bet and play at and upon and by means of said gaming tables and gambling devices.

The indictment is drawn under section 2194 of the Revised Statutes of 1899, as amended by the act of 1901, Laws of 1901, page 130, which is as follows: "Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property, and shall induce, entice or ^{§10} permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side of or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

Defendant's first insistence is that it is no offense, under said section of the statute, to set up and keep a poker-table, and to entice or permit persons to play at or upon the same, for the reason that a poker-table is not specifically mentioned in the statute, nor prohibited by the general provision.

In *State v. Rosenblatt*, 185 Mo. 114, 83 S. W. 975, the accused was indicted under this same statute, and convicted of the offense of setting up and keeping a crap-table. The contention of the defendant was that the indictment did not charge the "setting up or keeping" any of the tables or gambling devices denounced by the statute; that instead of charging the setting up and keeping a roulette table, it

charged the setting up and keeping of a roulette wheel, and did not specify either of the gambling devices specified in said section. Upon this proposition Gantt, J., speaking for the court, said:

“The statute is broad enough to and does include the setting up or keeping ‘any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property,’ and this indictment specifically charges that the defendant did set up and keep one crap-table, commonly so called, upon which dice are used, and one chuckaluck-table, commonly so called, upon which are used dice, ‘which said gaming tables and gambling devices were adapted, devised and designed for the ⁶¹¹ purpose of playing games of chance for money and property,’ etc.

“‘Chuckaluck’ and ‘craps’ are not named, and therefore do not have a legal signification within the meaning of the statute, but if prohibited at all, must come within the general prohibition of the section. Conceding that all other gambling tables and devices not specifically named must, under the doctrine ejusdem generis, be of the same general class with those devices specifically named, we think there can be no doubt that a chuckaluck-table and a crap-table are of that class.

“It was so ruled of ‘keno’ under a statute of Arkansas substantially in the words of section 2194: Gould’s Digest of Arkansas, c. 51, p. 369, sec. 1, art. 3; Portis v. State, 27 Ark. 360; Trimble v. State, 27 Ark. 355. Also of ‘pico’: Euper v. State, 35 Ark. 629. In Bell v. State, 32 Tex. Cr. Rep. 187, 22 S. W. 687, a ‘crap-table’ was held to be a gambling device within the statute of that state against keeping or exhibiting, for the purpose of gambling, a gaming table or bank. A like ruling was made as to a ‘nickle-in-the-slot machine’ by the supreme court of Georgia in Kolshorn v. State, 97 Ga. 343, 23 S. E. 829. See, also, Mims v. State, 88 Ga. 458,” 14 S. E. 712.

That case was also approved and followed in State v. Lockett, 188 Mo. 415, 87 S. W. 470. The cases of State v. Gilmore, 98 Mo. 206, 11 S. W. 620, and State v. Etchman, 184 Mo. 193, 83 S. W. 978, are not in conflict with those cases.

Counsel for defendant lay much stress upon the fact that the game of poker does not require a table or device of a certain kind, and specially adapted, devised and designed

for the playing of the game of poker alone. Nor was it necessary that the table should be specially adapted, devised and designed for the purpose of playing poker alone. The statute should not be given any such restricted meaning. It prohibits the setting up or keeping "any kind of gambling table or ⁶¹² gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property," and the inducing, enticing or permitting "any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device," always putting it in the disjunctive. It makes no difference whether the table on which the game of poker was played was a gambling device or not; if it was a table, adapted, devised and designed for the purpose of playing any game of chance for money or property, and the defendant permitted any person to bet or play upon such table, he is guilty as charged. That the poker-table, so called, was adapted and designed for the purpose of playing games of chance is clearly shown by the fact that games of poker were played thereon, in some of which at least the defendant participated.

A further contention is that the game of poker cannot be played by means of a table alone, but that the thing that is adapted, devised and designed for the purpose of playing such game is an ordinary deck of playing-cards. The primary object of the statute was to prevent gambling, by prohibiting the setting up or keeping any kind of table or gambling device for the purpose of playing any game of chance for money or property, and although cards or dice may be necessary to be used in conjunction with such table or device, in order to play such game of chance, it is none the less a gambling table or device when used in conjunction with cards or dice for the purpose of playing a game of chance for money or property: *State v. Rosenblatt*, 185 Mo. 114, 83 S. W. 975; *State v. Locket*, 118 Mo. 415, 87 S. W. 470.

It is next insisted that the court erred in admitting evidence tending to show that a crap game was being conducted in the building known as the Belmont Block, without requiring the state to show that the game was ⁶¹³ being played on a crap-table, adapted, devised and designed for the purpose of playing the game of craps, and that the table was set up or kept by the defendant and that he enticed or permitted persons to bet or play upon it. The evidence was conclusive

that the game of craps was played on a table set up or kept by defendant, and that he permitted persons to bet at or play upon said table. Whether such table was specially adapted, devised and designed for the purpose of playing the game called craps, for money or property, is immaterial, so long as it was used for such purpose, what we have already said with respect to the poker-table applying with equal force to this proposition.

Other questions are raised by defendant, but as they seem to be without merit, we do not feel it necessary to pass upon them.

Finding no reversible error in the record, the judgment is affirmed.

All concur.

GAMBLING GAMES AND DEVICES.

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I. Gambling Games.

a. **Gaming Generally.**—The gaming or gambling to be treated of in this note is that by which the parties stipulate that they shall gain or lose on the happening of an event in which they have no interest except that arising from the possibility of such gain or loss. Such gaming has been defined as being an agreement between two or more persons to risk money or other thing of value on a contest or chance of any kind, where one must be the loser and the other the winner: *Bell v. State*, 5 Sneed, 507. In all, or nearly all, of the states of the United States, statutes exist having for their object the prohibition of all, or of various kinds of, gambling. Under such statutes the word "gaming" and the word "gambling" are defined as the same, and treated as synonymous: *Evans v. Cook*, 11 Nev. 69. The legal meaning of the term "bet," used in connection with gaming, is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties according to the result of a trial of chance, or skill, or both combined: *Mayo v. State* (Tex. Cr. App.), 82 S. W. 515. It is not necessary, to constitute a bet upon a gaming table, that there be an express understanding between the parties to that effect: *Rainbolt v. State* (Tex. Cr. App.), 101 S. W. 217. Under modern authority it is not essential to constitute gambling under the statutes that both parties shall stand to lose by the chance. It is enough that one of them stands to lose or win by such chance: *Lang v. Merwin*, 99 Me. 486, 105 Am. St. Rep. 293, 59 Atl. 1021. The offense of gaming is complete though the person gambling played at the prohibited game only once: *Cameron v. State*, 15 Ala. 383; *Swallow v. State*, 20 Ala. 30. Thus a person may be convicted of gaming at cards in a public place, though he played there only once: *Nickols v. State*, 111 Ala. 58, 20 South. 564. Keeping a gaming table is gaming: *Whitfield v. State*, 4 Ark. 171; and to convict for keeping and exhibiting a gaming table for the purpose of gaming, it is not necessary to show that any betting was done, or that money or anything of value was wagered: *Brodgen v. State*, 47 Tex. Cr. App. 121, 80 S. W. 378; *Carroll v. State* (Tex. Cr. App.), 81 S. W. 294. A person does not carry on a gambling business in the state where he receives money as the agent of others to telegraph it to persons in another state to wager it there as directed: *McQuesten v. Steinmetz*, 73 N. H. 9, 58 Atl. 876. Nor can one who, as agent for another, receives money from such other and sends it to a third person to be wagered, be convicted of gaming: *Windsor v. State*, 46 Tex. Cr. App. 140, 79 S. W. 312.

b. **Backgammon.**—The game of "backgammon" as usually played, though dice are employed, is not a "game played with dice," within the prohibition of the statutes against gaming: *Wetmore v. State*, 55 Ala. 198.

c. **Bagatelle.**—Betting on the game of bagatelle at a public place is a violation of the statute against gaming, and it is equally so if the

person plays as well as bets: *Neal v. Commonwealth*, 22 Gratt. 917; and the same rule applies if in some cases the losers are by the terms of the game to pay for the use of the apparatus, and in others for the drinks, although nothing else is actually bet on the game: *People v. Cutler*, 28 Hun, 465.

d. Billiards and Pool.—The weight of authority is to the effect that playing billiards upon the terms that the loser shall pay for the use of the table, or for the use of the table and for liquors and cigars to be used by the winner, is gaming within the meaning of the statutes to prohibit gambling: *Mount v. State*, 7 Ind. 654; *Hamilton v. State*, 75 Ind. 586; *Murphy v. Rogers*, 151 Mass. 118, 24 N. E. 35; *State v. Leighton*, 23 N. H. 167; *State v. Cutler*, 28 Hun, 465; and the keeper of a billiard-room where persons, with his knowledge, play billiards with the understanding that the loser shall pay for the use of the table is guilty of keeping a gaming-house, and the players are guilty of gambling: *State v. Book*, 41 Iowa, 550, 20 Am. Rep. 609; *People v. Harrison*, 28 How. Pr. 247; *Ward v. State*, 17 Ohio St. 32. Other cases, however, hold that such keeper of a billiard-table conducts a lawful business: *Breninger v. Treasurer of Belvidere*, 44 N. J. L. 350; *People v. Seageant*, 8 Cow. 139. It has also been decided that billiard-playing is a game, not of chance, but of skill, and that the keeper of a billiard-table cannot be convicted of permitting a "game of chance" upon his premises, on proof that he allowed billiard-playing: *Northam v. State*, 59 Miss. 179. Concerning the game known as "rondo," it has been decided that the license of billiard-tables was evidently intended only to legalize the game of billiards proper, in the popular and commonly received acceptation of that term. It was not intended, and can with no propriety be held to authorize games, other than that for which the table is commonly understood to have been designed. Its protection can, by no reasonable nor just construction, be held to extend to gaming under any name or description whatever, or to games devised or played for the purpose of gaming, though they may be known to a certain class of adepts as a "species," or as included under some one of the several kinds and varieties, of billiards: *Barker v. State*, 12 Tex. 293. On the other hand, it has also been decided that a statute against gaming does not embrace the game of "rondo," when it is not specially mentioned: *State v. Hawkins*, 15 Ark. 259.

Playing pool under an agreement among the players that the one losing the game shall pay for the use of the table or for the drinks is generally considered to be gaming, within the meaning of the prohibitory statutes: *Hopkins v. State*, 122 Ga. 583, 50 S. E. 351, 69 L. R. A. 117; *People v. Cutler*, 28 Hun, 465; *State v. Kelly*, 24 Tex. 182; *Mayo v. State* (Tex. Cr. Rep.), 82 S. W. 515. Betting money or property upon the game called "pool" is within the prohibition of the statute against gaming: *State v. Jackson*, 39 Mo. 420. And so is the game called "pin-pool," in Texas: *Cohen v. State*, 17 Tex. 142.

But not in Louisiana: *State v. Quaid*, 43 La. Ann. 1076, 26 Am. St. Rep. 207, 10 South. 183.

e. Card-playing.—Engaging in playing any game of cards in which money, property, or other thing of value is won or lost is generally considered gaming within the meaning of statutes prohibiting and penalizing gambling: *Simmons v. State*, 106 Ga. 355, 32 South. 339; *In re Rowland*, 8 Idaho, 595, 70 Pac. 610; *Eubanks v. State*, 5 Mo. 450. Playing poker with a three, five and ten cent limit is gaming within the meaning of such statute: *Ford v. State*, 86 Miss. 123, 38 South. 229. A faro game is a banking game, and he who keeps it, and those who play at it, for something of value, are guilty of gaming: *State v. Behan*, 113 La. 754, 37 South. 714; *State v. Burton*, 25 Tex. 420. In some states playing games of cards in a public place for recreation and amusement only has been prohibited by statute: *Chambers v. State*, 25 Tex. 307; *Hearn v. State*, 25 Tex. 336; *Commonwealth v. Terry*, 2 Va. Cas. 77.

f. Chips.—When persons play a game for “checks,” or “chips,” which represent certain sums and which, when presented to the dealer or some other person, are redeemed at the price which they represent, this is playing a game for a thing of value, and unlawful under the statute: *Porter v. State*, 51 Ga. 300; *Robinson v. State*, 77 Ga. 101; *Walton v. State*, 14 Tex. 381. Under a statute making it a penal offense for any person to play for money or other valuable thing, at any game with cards, dice, checks, or at billiards, the offense may be committed by gaming for checks, notes or instruments, understood by the parties to represent value, although they are intrinsically valueless: *Gibbons v. People*, 33 Ill. 442. The betting of checks or counters at a faro bank, which it is agreed and understood by the parties to represent money or bank notes, and for which money or bank notes is paid by either winner or loser, is a violation of the statute against gaming: *Ashlock v. Commonwealth*, 7 B. Mon. 44.

g. Cockfighting is gaming within the spirit or meaning of statutes prohibiting gambling, and the betting thereon or keeping an establishment where cockfighting is carried on is unlawful and indictable: *Commonwealth v. Tilton*, 8 Met. 232; *Bagley v. State*, 1 Humph. 486.

h. Contests of Skill.—Baseball is a game of skill within the meaning of a statute making it unlawful to bet money or any valuable thing on any game of hazard or skill: *Mace v. State*, 58 Ark. 79, 22 S. W. 1108. So a wrestling match is a game of skill, and a bet thereon is gaming within the meaning of the statute: *Desgain v. Wessner*, 161 Ind. 205, 67 N. E. 991. But for three cycle clubs to contest for a cup, purchased by the voluntary subscriptions of persons not members of any of the clubs, and offered as a prize in a series of bicycle races, is not betting, nor gambling, nor against public policy: *Wilkinson v. Stitt*, 175 Mass. 581, 56 N. E. 830.

i. **Craps.**—A game of dice called craps, in which one person sits behind the table and takes all of the bets of the persons playing on the outside, the dice being thrown by such players alternately, is a banking game within the meaning of a statute providing that any person who shall bet at any gaming table or bank shall be punished: *Aguar v. State* (Tex. Cr. Rep.), 47 S. W. 464; *Faucett v. State*, 46 Tex. Cr. Rep. 113, 79 S. W. 548. But it has been decided under the same statute that the ordinary game of craps at which the parties who were in attendance bet and played against each other, and where the owner of the game or table did not bet against all comers, but merely acted as stakeholder and took out a commission for the use of the table, was not a banking game or table, for the keeping of which the owner was liable to prosecution: *Cummings v. State* (Tex. Cr. Rep.), 72 S. W. 395; *Campbell v. State* (Tex. Cr. Rep.), 72 S. W. 396.

j. **Horseracing.**—As a general rule, it may be stated that a horserace is a game, that gaming includes horseracing, and that betting on horseraces is illegal gaming, within the meaning of statutes enacted for the purpose of restraining or prohibiting gambling, although such races are not specially mentioned, nor enumerated in such statutes: *Corson v. Neatheny*, 9 Colo. 212, 11 Pac. 82; *Thrower v. State*, 117 Ga. 753, 45 S. E. 126; *Tatman v. Strader*, 23 Ill. 493; *Garrison v. McGregor*, 51 Ill. 473; *Shaffner v. Pinchback*, 133 Ill. 410, 23 Am. St. Rep. 624, 24 N. E. 867; *Cheesum v. State*, 8 Blackf. 332, 44 Am. Dec. 771; *Wade v. Deming*, 9 Ind. 35; *Cheek v. Commonwealth*, 100 Ky. 1, 37 S. W. 152; *Shrophire v. Glascock*, 4 Mo. 536, 31 Am. Dec. 189; *Boynton v. Curle*, 4 Mo. 599; *Swaggard v. Hancock*, 25 Mo. App. 596; *Opinion of Justices*, 73 N. H. 625, 63 Atl. 505. Betting and holding stakes on horseraces to be run outside the state are misdemeanors, and illegal gambling: *State v. Lovell*, 39 N. J. L. 463. Betting on a horserace is gambling, and bookmaking and poolselling are each betting upon a horserace, or particular event upon which they are made or sold: *St. Louis Fair Assn. v. Carmody*, 151 Mo. 566, 74 Am. St. Rep. 571, 52 S. W. 365. Under a statute providing that whoever, except in trials of speed of horses for premiums offered by corporations, authorized thereto, engages in racing a horse for a bet of money or other valuable thing shall be punished, etc., if a corporation authorized to do so causes trials of speed of horses to be had for premiums offered by the association, one who bets at such trials of speed is liable to the punishment imposed by the statute: *Commonwealth v. Rosenthal* (Mass.), 80 N. E. 814. Under a statute making it lawful to bet on any horserace, when the track on which the race is run is inclosed by a substantial fence, and the bet or wager is made within such inclosure on a race to be run therein, it is unlawful gaming to bet outside such inclosure on a race run within the inclosure: *Debardelaben v. State*, 99 Tenn. 649, 42 S. W. 684. In Louisiana the laws heretofore passed against gambling do not in-

clude betting on horseraces when the betting is done at the races or racetrack, but, on the contrary, betting on horseraces has the law's special sanction: *City of Shreveport v. Maloney*, 107 La. 193, 31 South. 702. But gaming in poolrooms is prohibited by statute, whether the betting is upon horseraces or other events: *State v. Rabb*, 115 La. 733, 39 South. 971. It has been decided that a statute prohibiting the betting of money at "any game of hazard or skill" is not intended to embrace horseracing: *State v. Rorie*, 23 Ark. 726; *State v. Vaughn*, 81 Ark. 117, 118 Am. St. Rep. 29, 98 S. W. 685, 7 L. R. A., N. S., 899. Also that horseracing is not a game of chance, and that to bet on a horserace is not illegal gaming under the statute: *Harless v. United States, Morris (Iowa)*, 169; *Commonwealth v. Shelton*, 8 Gratt. 592.

"Bookmaking" and "pool selling," constitute gaming or gambling which the state may prohibit altogether, or may regulate or control by restricting the business to certain localities, or by prohibiting it in others: *State v. Thompson*, 160 Mo. 333, 83 Am. St. Rep. 468, 60 S. W. 1077, 54 L. R. A. 950; *State v. Oldham*, 200 Mo. 538, 98 S. W. 497. And a sale of a pool in one state on a horserace run upon a track outside the state may constitute gaming: *Edwards v. State*, 8 La. 411. And one who maintains a poolroom for such purpose is himself guilty of gaming: *Thrower v. State*, 117 Ga. 753, 45 S. E. 126. In those states where betting on horseraces is not prohibited by statute and not deemed gaming, the maintenance of a place where the business of selling pools on horseraces is conducted is, nevertheless, the keeping of a gaming-house, and a common-law criminal nuisance, which may be suppressed: *State v. Nease*, 46 Or. 433, 80 Pac. 897; *State v. Ayres (Or.)*, 88 Pac. 653; *State v. Vaughn*, 81 Ark. 117, 118 Am. St. Rep. 29, 98 S. W. 685, 7 L. R. A., N. S., 899.

k. **Keno.**—The game of keno, when kept or exhibited by a person so that all who desire may gamble at it, is gaming within the meaning of the statutes prohibiting gambling: *Eslava v. State*, 44 Ala. 406; *Miller v. State*, 48 Ala. 122; *Portis v. State*, 27 Ark. 360; *Brown v. State*, 40 Ga. 689; *Bethune v. State*, 48 Ga. 505. The game called and known as "keno" is a game at which money or property may be won or lost, and playing at it is gaming within the meaning of the statute: *Trimble v. State*, 27 Ark. 355. The evil to be suppressed under the statute is a gaming-house with its capital always ready for play. Whether the stake be owned or furnished by the house, or made up at the time by the players, the evil is the same, and the offense is the same. The game, then, of keno, which is of the lottery description, is within the statute: *City of New Orleans v. Miller*, 7 La. Ann. 651; and this is true although the owner of the game takes out nothing but commissions: *Trimble v. State*, 27 Ark. 355.

l. **Lotteries.**—A lottery is gaming within the provisions of a city charter authorizing the city to prevent and suppress gaming: *Ex parte Kameta*, 36 Or. 251, 78 Am. St. Rep. 775, 60 Pac. 394. And an agree-

ment between several persons to share in the proceeds of lottery tickets purchased by them is void as a gaming contract: *Roselle v. Farmers' Bank*, 141 Mo. 36, 64 Am. St. Rep. 501, 39 S. W. 274. Playing at "policy" is playing a lottery, and is unlawful gaming: *State v. Carpenter*, 60 Conn. 97, 22 Atl. 497.

m. **Common Gaming** is an agreement between two or more persons to risk money or other thing of value on a contest or chance of any kind, where one must lose and the other win. Thus the sporting artifice commonly called a "gift enterprise," by which a merchant sells his wares for their market value, but by way of inducement gives to each purchaser a ticket which entitles him to a chance to win certain prizes, to be determined after the manner of a lottery, is common gaming under the statute, and all persons aiding or abetting such transaction are liable: *Bell v. State*, 5 Sneed, 507; *Eubanks v. State*, 3 Heisk. 488.

n. **Playing for Drinks or Cigars.**—Playing at cards or any game of chance or hazard under an agreement that the beaten person shall treat to drinks or cigars is unlawful gaming: *State v. Wade*, 43 Ark. 77, 51 Am. Rep. 560; *State v. Maurer*, 7 Iowa, 406; *State v. Leicht*, 17 Iowa, 28; *State v. Bishel*, 39 Iowa, 42; *McDaniel v. Commonwealth*, 6 Bush, 326; *Stahel v. Commonwealth*, 7 Bush, 387; *Commonwealth v. Taylor*, 14 Gray, 26; *Lord v. State*, 16 N. H. 325, 41 Am. Dec. 729; *Brown v. State*, 49 N. J. L. 61, 7 Atl. 340; *Walker v. State*, 2 Swan, 287; *Van Wey v. State*, 41 Tex. 639; *Tuttle v. State*, 1 Tex. App. 364; *Stone v. State*, 3 Tex. App. 675. If persons bet upon a game of chance of any kind, with the understanding that the loser shall pay the bill of the company, or for liquor to be paid for by the loser, it is in effect gaming, and a betting of money: *Bachellor v. State*, 10 Tex. 258; *Tuttle v. State*, 1 Tex. App. 364. Wagering drinks, cigars, or anything of value, on any game of chance, is gaming, and in violation of a statute prohibiting betting on such game: *Humphreys v. State*, 34 Tex. Cr. Rep. 434, 30 S. W. 1066.

o. **Raffling.**—A person may be convicted of gaming on proof that he took a chance in a raffle, and threw dice at the drawing, which was conducted in the customary manner: *McInnis v. State*, 51 Ala. 23; *Johnson v. State*, 83 Ala. 65, 3 South. 790; *Stearnes v. State*, 21 Tex. 692; *Long v. State*, 22 Tex. App. 194, 58 Am. Rep. 633, 2 S. W. 541. If several parties each put up a piece of money and then decide by throwing dice, who shall have the aggregate sum or pool, the game is one of chance, and the fact that the aggregate sum so put up is exchanged for a turkey and the transaction is denominated a "raffle," does not change the character of the game: *State v. De Boy*, 117 N. C. 702, 23 S. E. 167. The illegal character of the transaction constituting a raffle is not affected by the fact that the raffle never took place: *Koster v. Seney*, 99 Iowa, 584, 68 N. W. 824. Under a statute declaring any person guilty of gaming, who, in order to raise money

for himself or another, shall put up any prize or thing to be raffled for, one who sells or offers to sell, a chance in a raffle is not guilty of gaming: *Kirk v. State*, 69 Miss. 215, 10 South. 577.

In Arkansas it has been decided that a raffle is not within the meaning of the statute enacted against gaming, affecting only banking games and betting on games of cards: *Norton v. State*, 15 Ark. 71. Under an old Virginia statute, taking a chance in a raffle at twenty dollars or any less sum, although the property raffled for exceeds that sum in value, does not bring the person within the operation of the gaming act, but the winner of the thing raffled for, if it exceeds twenty dollars in value, does come within the operation of the law: *Commonwealth v. Garland*, 5 Rand. 652.

p. **Tenpins or Bowls.**—The game known as tenpins or bowls, is not a game of chance for betting at which the participants are guilty of gaming: *Crow v. State*, 6 Tex. 334; *State v. Gupton*, 8 Ind. 271; *State v. King*, 113 N. C. 631, 18 S. E. 169; and where it is one of the terms of the establishment that the loser is to pay for the use of the alley, such playing is not gambling: *State v. Hall*, 32 N. J. L. 158; *Breninger v. Treasurer of Belvidere*, 44 N. J. L. 350. On the other hand, some courts hold that bowling-alleys connected with taverns are unlawful, although the players only risk the price of the game: *State v. Records*, 4 Harr. (Del.) 554; or the hire of the alley: *Hamilton v. State*, 75 Ind. 586.

q. **Fantan.**—The Chinese game of fantan is a game of pure chance, and, when played for anything of value, constitutes gambling within the meaning of a statute making unlawful any game played for anything of value with any device or means suitable and convenient for that purpose, and in which the game depends largely on chance, or more on chance than skill: *In re Lee Tong*, 18 Fed. 253, 9 Saw. 333.

r. **Thimble.**—The game called thimble, or thimbles and balls, played with thimbles and balls, the stake depending upon designating a thimble under which a ball has been placed, is a prohibited gambling as against both the player and the keeper of the game: *State v. Red*, 7 Rich. 8.

II. Gambling Devices.

a. **Gaming Table.**—It is not the structure of a table that determines whether or not it is a gaming table, but the character of game that is played upon it. A table, to come within the statutory meaning of a gaming table, must be kept or exhibited for the purpose of obtaining betters: *Lyle v. State*, 30 Tex. App. 118, 28 Am. St. Rep. 893, 16 S. W. 765. And any table kept and used for gaming is a "table for gaming," within the meaning of the statute, though it has no peculiar devices or appliances, and is not necessarily used in playing any particular game: *Toney v. State*, 61 Ala. 1. A statute forbidding the keeping of "any table for gaming of whatever name, kind, or description," includes any table which is used for gaming, without regard to its appliances for any particular game: *Bibb v.*

State, 84 Ala. 13, 4 South. 275. The table or contrivance, however, to come within the meaning of the statute, must be such as is ordinarily used in gambling for money, or property, when it is not specially named in the statute: Commonwealth v. Schatzman, 26 Ky. Law Rep. 508, 82 S. W. 238.

Under a statute prohibiting the use of roulette, A B C or faro table, or "other table of like character," for gambling purposes, the words "other table of like character" embrace any table on which visible, material or mechanical means are employed to dispose of money or other article of value by chance, under conditions of risk, and with the result of profit to one of the participants and loss to another. Hence a table in the nature of a roulette-table, upon which articles of merchandise are gambled for is a gaming table, and a gambling device: Muirs v. State, 88 Ga. 458, 14 S. E. 712.

b. **Poker-tables.**—The setting up of a poker-table on which are used poker chips and cards for gaming is not a gambling device within the meaning of a statute making it a felony for anyone to set up or keep any gambling device commonly called A B C, faro bank, roulette, equality, keno, or any kind of gambling table or gambling device: State v. Etchman, 184 Mo. 193, 83 S. W. 978. A poker-table, not being enumerated in the statute against gambling, is not a gambling device: State v. Mann, 2 Or. 238. A table with a hole in the center, through which players playing the game of draw-poker, drop a chip for the owner of the table, when they hold threes, flushes, or full hands, is not a gaming table or gambling device within the meaning of the statute: Lyle v. State, 30 Tex. App. 118, 28 Am. St. Rep. 893, 16 S. W. 765. It has been decided, however, that a statute which prohibits the keeping or exhibition of gaming tables is not confined to tables on which banking games are played, and includes tables for games of cards, such as draw-poker: Wren v. State, 70 Ala. 1.

c. **Crap-tables.**—A crap-table, although not specially mentioned in the statute, is within its meaning an illegal gambling device, when it prevents anyone from setting up or keeping any kind of a gambling table or gambling device adapted for the purpose of playing games of chance: State v. Rosenblatt, 185 Mo. 114, 83 S. W. 975; State v. Locket, 188 Mo. 415, 87 S. W. 470. A table especially prepared for the game of craps, and exhibited to attract betters, by a person who presides at and keeps his money on such table, against whom all patrons bet, and who takes every bet offered, is an unlawful gaming table and a gambling device: Copeland v. State, 36 Tex. Cr. Rep. 576, 38 S. W. 189; Bell v. State, 32 Tex. Cr. Rep. 187, 22 S. W. 687; in effect overruling Chappell v. State, 27 Tex. App. 310, 11 S. W. 411.

d. **Chuckaluck.**—A chuckaluck-table, although not specially mentioned in the statute, is within the meaning of a statute making it a felony for one to set up or keep and to entice or permit anyone to

play on any kind of gambling table or gambling device adopted for the purpose of playing games of chance: *State v. Rosenblatt*, 185 Mo. 114, 85 S. W. 975.

e. **Cards.**—The early Missouri cases maintain that an ordinary pack of playing-cards with which money is won or lost is a gambling device, under a statute making it an offense to bet money on any game played at or by means of any gambling device: *State v. Purdom*, 3 Mo. 114; *State v. Herryford*, 19 Mo. 377; *State v. Torphy*, 66 Mo. App. 434. But under an amended statute enumerating certain contrivances as gambling devices and prohibiting their use, but not specially naming playing-cards, it is now maintained, in that state, that under the rule of *ejusdem generis*, ordinary playing-cards, and poker chips are not a gambling device within the meaning of the statute: *State v. Gilmore*, 98 Mo. 206, 11 S. W. 620. And to the same effect is *State v. Hardin*, 1 Kan. 474. An ordinary pack of playing-cards has been determined to be a gambling device when played with for money, within the meaning of a statute prohibiting gambling with any gambling device whatever: *Frisbie v. State*, 1 Or. 264.

f. **Crackloo.**—The game of crackloo is a gambling device when played for money within the meaning of a statute, prohibiting any person from setting up any gambling device or playing at any game whatever for money: *State v. Flack*, 24 Mo. 378; *Town of Canton v. Dawson*, 71 Mo. App. 235,

g. **Dice.**—Dice constitute a gambling device within the meaning of a statute providing punishment for keeping or exhibiting for gain "any gambling apparatus, device, table or machine of any kind or description under any denomination or name whatever": *White v. State*, 37 Ind. App. 95, 76 N. E. 554. To provide, use and induce others to use dice in a game of craps by which money or property is won or lost is an offense under the statute, as dice, when so used, are a gambling device within the meaning of statutes prohibiting gambling: *State v. Oswald*, 59 Kan. 508, 53 Pac. 525.

h. **Gun and Target.**—A gun and target, although used as the means of betting money, are not a gambling device within the meaning of a statute enumerating "A B C, faro bank, E O, roulette, equality, and keno," and prohibiting betting upon any other gambling device: *State v. Bryant*, 90 Mo. 534, 2 S. W. 836.

i. **Keno.**—The game called and known as keno is a game at which money or property may be won or lost, and is a gaming device within the meaning of a statute prohibiting gambling: *Trimble v. State*, 27 Ark. 355. And a person who sets up, keeps or exhibits the apparatus with which the game of keno is played is guilty of setting up, keeping or exhibiting a gambling device, and is liable to the penalty of the statute: *Portis v. State*, 27 Ark. 360; *Euper v. State*, 35 Ark. 629; *Overby v. State*, 18 Fla. 178.

j. Horseracing and Bookmaking Thereon.—It has been decided that a horserace is not a gambling device within the meaning of a statute prohibiting gambling by means of certain enumerated devices, but not specially mentioning horseraces: *State v. Hayden*, 31 Mo. 35; *State v. Lemon*, 46 Mo. 375. But, on the other hand, it has also been decided that a horserace is a gambling device within the meaning of such a statute: *Joseph v. Miller*, 1 N. Mex. 621.

Under a statute prohibiting the use of any room, shed, booth, or building, or any part thereof, by the owner or any other person, with his knowledge and consent, with a book, instrument or device for the purpose of recording or registering bets or selling pools on horse-races, a blackboard behind a betting booth on which the names of horses and the odds therein are written, and numbered tickets are issued to bettors, does not constitute a book: *State v. Oldham*, 200 Mo. 538, 98 S. W. 497. The keeping of a house for selling pools on horseraces is not punishable under a statute relating to the playing of games by gambling devices, since the winner is not determined by the manipulation of any device: *State v. Ayers (Or.)*, 88 Pac. 653. It has been decided that bookmaking on a horserace is a game of chance, or gambling device, or contrivance, within the meaning of a statute to suppress gaming: *Miller v. United States*, 6 App. Cas. (D. C.) 6.

k. Loto.—The game of loto is a gambling device, and if a loto-table is kept at which such game is played, for money, both the players and the keeper of the table are liable under the statute: *Lowry v. State*, 1 Mo. 722.

l. Paris Mutuels.—The machine or contrivance known as "Paris Mutuels," or "French Pools," used in betting on horseracing is a gambling device within the meaning of a statute which prohibits the use of any contrivance or device used in betting, or other game of chance, whereby money or other thing is, or may be, won or lost: *Commonwealth v. Simonds*, 79 Ky. 618.

m. Stock Clock.—The contrivance commonly known as a stock clock is a gambling device within the meaning of an ordinance prohibiting the setting up or keeping of any gambling device designated to be used in gambling, and imposing a penalty for its violation: *State v. Grimes*, 49 Minn. 443, 52 N. W. 42.

n. Slot Machines.—Slot machines of all descriptions are generally considered to be unlawful gambling devices. Thus a slot machine, when a contrivance or apparatus by which it is determined who, as between the player and the proprietor, is the winner or loser of money hazarded, is a gambling device: *Lyman v. Kurtz*, 166 N. Y. 274, 59 N. E. 903. And a slot machine into which a customer drops a nickel, and thereupon receives, in any event, a five-cent cigar, and may receive an additional number without further payment, is an illegal gambling device: *Lang v. Merwin*, 99 Me. 486, 105 Am. St. Rep.

293, 59 Atl. 1021. So a person who maintains a nickel in the slot machine displaying a poker-hand, by which a person depositing a nickel and playing the machine is entitled to a cigar or a package of chewing gum, each valued at five cents, and, in addition thereto, a prize according to the hand displayed, violates a statute providing that no person "shall keep, maintain, employ, or carry on any lottery or other scheme or device for the hazarding of any money or valuable thing": *Meyer v. State*, 112 Ga. 20, 81 Am. St. Rep. 17, 37 S. E. 96, 51 L. R. A. 496. And any scheme or device, such as a nickel-in-the-slot machine operated by a person, by which one participating therein may either lose the money invested or get more than his money's worth, the operator retaining the money so lost, is a scheme or device for the hazarding of money, within the meaning of a statute prohibiting such hazard: *Meyer v. State*, 112 Ga. 20, 81 Am. St. Rep. 17, 37 S. E. 96, 51 L. R. A. 496.

Under the statute of Illinois, a slot machine is a gambling device, and the mere keeping of it is a criminal offense, whether the machine is kept for gambling or not. The purpose of the statute is to suppress such devices altogether even by their destruction: *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322. If the accused kept and maintained a machine so contrived that if one dropped a nickel in the slot therein he would either lose the nickel or win fifteen cents, and the object and purpose of the accused in keeping and maintaining the machine was to win money in this manner, he was guilty of keeping and maintaining an unlawful gambling device: *Kolshorn v. State*, 97 Ga. 343, 23 S. E. 829. A slot machine so constructed that it offers unequal chances to the player and the exhibitor is an illegal gambling device: *State v. Caughan*, 55 W. Va. 692, 48 S. E. 210. The use of a slot machine, where an element of chance determines whether prizes are to be given, brings its operation under the definition of an unlawful lottery or gambling device, whether the prizes given are stock in trade of licensed establishments or not: *City of New Orleans v. Collins*, 52 La. Ann. 973, 27 South. 532. And the maintenance of a slot machine in a saloon, by the operation of which one who drops a nickel in the machine becomes entitled to at least five cents in trade and possibly more, is a violation of a statute prohibiting gambling: *In re Cullinan*, 114 App. Div. (N. Y.) 654, 99 N. Y. Supp. 1079; overruling *Cullinan v. Hosmer*, 100 App. Div. (N. Y.) 148, 91 N. Y. Supp. 607. A nickel-in-the-slot machine so constructed that if the nickel, in falling into the machine, touched certain springs a valve would be opened and the machine would pay a certain amount of money in excess of the deposit, but the nickel deposited would remain in the machine and the proportion of times when one playing the machine would win was less than the times when he would lose, constitutes such machine a gaming device prohibited by statute: *Prendergast v. State*, 41 Tex. Cr. Rep. 358, 57 S. W. 850. A slot machine is a gaming device which can be kept and

exhibited for gaming, although it is a mere automaton, which keeps and runs itself: *Christopher v. State*, 41 Tex. Cr. Rep. 235, 53 S. W. 852. And a clock maintained in a drugstore, so arranged that by placing a nickel in the slot music is played and a red, white, blue, or green light will automatically appear, in which case the person depositing the nickel is entitled to a certain amount of merchandise valued according to the light appearing, there being no blanks, is a slot machine, and a gaming device: *Lytle v. State* (Tex. Cr. Rep.), 100 S. W. 1160.

In *State v. Woodman*, 26 Mont. 348, 67 Pac. 1118, it was decided that under a statute prohibiting the operation of games of chance, and among others that of running nickel-in-the-slot machines "for money, checks, credits, or any representative of value, or for any property or thing whatever, a nickel-in-the-slot machine, involving in its operation the element of chance as to whether the player obtained in cigars more or less than the value of his money, was prohibited by such statute. But in *Ex parte Williams* (Cal. App.), 87 Pac. 565, it was decided that it is not a crime under a statute making it an offense to operate any banking or percentage game played with any device "for money, checks, credit, or other representative of value," to set up and operate a slot machine on which games are played, unless played for money, checks, credits, or other representative of money, and that if played for something not included in these words, as for cigars, for instance, it is not a crime.

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CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

STATE ELECTRO-MEDICAL INSTITUTE v. PLATNER.
[74 Neb. 23, 103 N. W. 1079.]

CORPORATIONS—Contracts to Practice Medicine.—A contract made by a corporation to furnish medical services to be performed by a licensed physician is valid, and the corporation may recover upon such contract. (p. 707.)

CORPORATION to Practice Medicine.—Licensed practitioners of medicine may form a corporation to practice medicine, and make valid contracts with their patients therefor in the corporate name. (p. 711.)

E. J. Cornish and N. C. Pratt, for the plaintiff in error.

Baldrige & De Bord, for the defendant in error.

²³ SEDGWICK, J. This plaintiff in error made a contract in writing with the defendant in error whereby it agreed "to render professional services to the party of the second part, until the party of the second part shall be cured of a certain disease, as appears upon the books of the party of the first part." And the defendant on his part agreed to pay for the services a stipulated amount, and to "follow directions carefully, and take the medicine and remedies prescribed from time to time by the party of the first part, until a complete cure is effected." This contract was signed by the defendant, and was also signed "State Electro-Medical Institute, Physician in Charge." The plaintiff is a foreign corporation, and has an office and place of business in the city of Omaha. In the district ²⁴ court the plaintiff set out the foregoing contract, and alleged that it was made

on behalf of the plaintiff, "by and through its duly licensed and practicing physician," and alleged that it was doing business "by and through duly licensed and practicing physicians," and was organized for said purpose, and no other, and alleged that by and through L. H. Staples, a duly licensed and practicing physician, the plaintiff had partially performed the contract, and that the said physician, for and on behalf of the plaintiff, had been ready at all times, and is now ready and willing, to perform all the duties and obligations imposed by the terms of the contract, but the defendant has refused to perform. The plaintiff asks judgment for the amount due it upon the contract.

There was a general demurrer to this petition upon the ground that it did not state facts sufficient to constitute a cause of action, and also upon the ground that "said petition shows that the plaintiff is a corporation; that the contract forming the basis of the plaintiff's action is for medical services, and the plaintiff is incapacitated to render, or contract to render, or to sue for medical services." This demurrer was sustained, and judgment entered for the defendant, which judgment is brought here for review.

1. It is contended that a contract for medical services made by a corporation, to be performed by a licensed physician, is void, and that the corporation cannot recover upon such contract. The statute which forbids any person to practice medicine without first having obtained a license is quoted and discussed in *State Electro-Medical Institute v. State*, 74 Neb. 40, 103 N. W. 1078. The provision of the statute defining what is meant by the words "practice medicine" is also quoted and discussed, and the conclusion is reached that to make contracts such as the one in question here, and to collect compensation thereunder, does not constitute practicing medicine, as those words are used in this statute, and that therefore it is not forbidden to do these things without first being licensed.

²⁵ 2. The first ground set forth in the brief, from which it is there concluded that the plea of the plaintiff was insufficient, is stated as follows: "No person may practice medicine in the name of another, or under the direction and supervision of another." The case of *State v. Paul*, 56 Neb. 369, 76 N. W. 861, is cited. We think that this case holds the reverse of what seems to be contended for it. Dr. Bedell, who was the principal, and presumably the one with

whom the contract for treatment was entered into, was qualified and duly licensed under the statute. The defendant Paul was an assistant of Dr. Bedell, and, being not qualified and licensed to practice, he assumed to perform surgical operations and administer remedies to the sick and infirm. It was held that he was not protected by the qualifications and license of Dr. Bedell, although he acted as his assistant and under his directions. The principle established by this decision is that the qualifications of one who practices medicine are personal qualifications, and that it is the one who actually performs the surgical operation or administers the remedy that must be qualified and licensed under the statute. The fact that the doctor who makes the contracts, who takes the patients and undertakes to treat them, is duly qualified and licensed is immaterial. This seems to be the doctrine of *State v. Paul*, 56 Neb. 369, 76 N. W. 861.

3. The next point urged is that "no person may profit by or enforce an agreement for the practice of medicine, except he is qualified and licensed for the practice of the profession." This construction of the act would prevent action in the name of any assignee of a physician's claim for his services, whether such assignee might be a corporation, a copartnership or an individual. Ordinarily a disqualifying statute is strictly construed. Unless its provisions plainly disqualify the plaintiff from maintaining the action, it ought not to be given that effect. There is no language of the statute in question that can be so construed, nor is there anything in the spirit and purpose of the legislation that requires such construction. This ²⁶ question was mentioned in *Citizens' State Bank v. Nore*, 67 Neb. 69, 93 N. W. 160, 60 L. R. A. 737. It was said in the opinion in that case: "While section 15 provides that 'no person shall recover,' the latter part of the section indicates that this prohibition is limited to the practitioner himself." That is, no person shall recover upon such claim whether he be owner or assignee, or in whatever capacity he may claim to recover, unless "the practitioner himself" who performed the services was qualified and duly licensed at the time, and if the practitioner himself was qualified and duly licensed, the provision of the statute seems to be complied with.

The defendant cites the case of *Langdon v. Conlin*, 67 Neb. 243, 108 Am. St. Rep. 643, 93 N. W. 389, 60 L. R. A. 429, as holding that one who is not licensed as an attorney

and counselor at law cannot recover fees earned by an attorney who is licensed. That case is supposed to be authority for the proposition that a copartnership composed of one who is a licensed attorney and one who is not cannot recover for legal services furnished by the licensed attorney. But the case is not authority for such proposition. The point decided in the case is stated in the syllabus. It is contrary to public policy for one who is not an attorney at law to contract with one who is, for a share of the fees earned, to procure clients for him, who shall employ him to prosecute legal proceedings for them. Such contracts would tend to the encouragement of litigation, and the law will not recognize and enforce them. But if one who is not a licensed attorney is engaged in a collection or other similar business, we know of no principle of public policy that would prevent the formation of a copartnership between such a person and a licensed attorney, whereby it should be agreed that each would carry on his own particular business—the attorney at law practicing his profession—and that the earnings of both should belong to the copartnership. If it was distinctly understood that the practice of law should be carried on entirely by the licensed member of the firm, there seems to be no principle of public policy that would ²⁷ make such a contract unlawful: *Harland v. Lilienthal*, 53 N. Y. 438.

There is perhaps some language used in the opinion in *Langdon v. Conlin*, 67 Neb. 243, 108 Am. St. Rep. 643, 93 N. W. 389, 60 L. R. A. 429, that might be supposed to support the defendant's contention, and yet it is plainly stated in the opinion that there is but one proposition necessary to discuss, "and that is whether or not this contract is against public policy and good morals, and therefore void." The provision of the statute (Comp. Stats. 1903, section 5, chapter 7; Ann. Stats. 3604) prescribes it to be the duty of a licensed attorney "to counsel or maintain no other actions, proceedings, defenses, than those which appear to him legal and just, except the defense of a person charged with a public offense," and "not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest," and it is said in the opinion: "Under a statute with no more stringent regulations governing the practice of law than our own, a contract on all-fours with the one in the instant case was declared void, as against

public policy and good morals, in *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483. The case is supported in principle by the holdings in *Burt v. Place*, 6 Cow. (N. Y.) 431; *Munday v. Whissenhunt*, 90 N. C. 458. Where, as in the case at bar, a part of the consideration of the contract in issue was an agreement to furnish evidence in litigation to be commenced, the supreme court of New York, in *Lyon v. Hussey*, 82 Hun (N. Y.), 15, 31 N. Y. Supp. 281, said: 'It is clear that such a contract is against public policy. The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such a contract could never be recognized in any court of justice.' "

²⁸ This language puts the decision in that case strictly upon the point stated in the syllabus. It is the only point determined in the case.

In *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483, the contract sued upon was in substance this: A third person, not an attorney and counselor at law, enters into an agreement with an attorney and counselor at law that he will procure his employment by a litigant, and that in consideration of such procurement he is to have from the attorney and counselor so employed one-third part of whatever remuneration the attorney received for his services from the litigant; and it was held that such a contract was contrary to public policy and void. It will be noticed that the contract was to procure a certain person to intrust a particular litigation to the attorneys, and for this service one-third of the fee from the client was to be paid. The court said: "Now, if either of the attorneys who contracted with Bolte had lent to the latter his name to be used by him as attorney and counselor, he would have been guilty of a violation of the clause above quoted. . . . Was not Bolte really allowed to use their names in the prosecution of a matter in litigation?"

The principle involved is the same as in *Langdon v. Conlin*, 67 Neb. 243, 108 Am. St. Rep. 643, 93 N. W. 389, 60 L. R. A. 429. It is against public policy for attorneys to

employ one not licensed to procure clients for them. It is equally against public policy to allow one who is not licensed to use the name of a licensed attorney in the prosecution of a matter in litigation. This latter was because the statute of California expressly forbids such practice, and it was thought that the contract involved amounted to agreeing that an unlicensed person should prosecute litigation in the name of a licensed attorney. This case is not authority for the proposition that a corporation composed of licensed attorneys could not recover in the name of the corporation for legal services rendered by such attorneys. At all events the statute under consideration here cannot be construed to prevent ²⁹ licensed practitioners of medicine to form a corporation, and to make contracts with their patients in the corporate name. If one or more of the incorporators should not be licensed physicians, the case would not be different. The person who practices medicine, that is, who undertakes to judge the nature of disease, or to determine the proper remedy therefor, or to apply the remedy, must have the necessary qualifications and obtain license. No recovery can be had for the services of any physician who is not so qualified. A hospital which is controlled by a corporation, and which receives patients, and contracts to care for them and to furnish them with medical attendance, does not by so doing practice medicine within the meaning of this act. It is said that, if a corporation can make such contracts without obtaining a license, it will be within the power of its officers, who are not licensed to be physicians, and over whom the state board of health has no control, to obtain a fee upon the assurance that a manifestly incurable disease can be permanently cured. In other words, that a corporation may conduct itself as a physician may not; that it may do things that would be a sufficient ground for the state board of health to revoke the license of a physician if done by him, and that the purpose of the legislature was to prevent such action. Whether a physician who allowed a corporation to make such contracts for his services, or who associated himself with, and practiced in pursuance of contracts made by, corporations that indulged in conduct that would be unprofessional if done by a physician, might himself be made responsible for these acts of the corporation, and so subject himself to the penalties of this act, it is not necessary in this case to determine. This contract is signed by the "Physi-

cian in Charge." He would seem to be as much responsible for this contract, and his own action under it, as if he had executed the contract in his own name. Would the same be true of any physician who, being in the employ of this defendant, should practice medicine pursuant to this contract? If ^{so} further legislation is necessary to regulate and control the conduct of such corporations, and of physicians connecting themselves with such corporations, the argument should be addressed to the legislature. We cannot derive such legislation from any public policy indicated by the provisions of this act.

It is further suggested that one of the grounds for revoking the license of a practicing physician is unprofessional conduct in the betrayal of professional secrets, and that there is no restriction upon a corporation that might obtain such secrets and betray them. Such secrets are imparted for the purpose of enabling the physician who treats the patient to understand the nature of his disease and to determine the best course of treatment. No self-respecting physician would encourage the curiosity of his clerks or assistants in attempting to discover the secrets of his patients, and if he participated in such conduct, or knowingly consented to its exercise, he might furnish grounds for the revoking of his license. If the patient saw fit to divulge his secrets to the assistants or agents without the knowledge of the physician, he would be supposed by so doing to indicate his willingness that they be published to the world.

As was said in *State Electro-Medical Institute v. State*, 74 Neb. 40, 103 N. W. 1078, making such contracts as the one involved herein, and collecting compensation for services of qualified and licensed physicians rendered pursuant to such contract, do not constitute practicing medicine and are not in violation of the statute or public policy.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

Barnes, J., dissents.

In the Subsequent Case of *State Electro-Medical Inst. v. State*, 74 Neb. 40, 103 N. W. 1078, it was decided that while a corporation is a person in a certain sense and for many purposes is so considered, it is not such a person as can be licensed to practice medicine. But licensed physicians may form a corporation and make valid contracts for the services of its members and other licensed physicians, and

making such contracts and collecting compensation for services of qualified and licensed physicians rendered pursuant to such contract, do not constitute practicing medicine, and are not in violation of any statute or public policy.

A Statute Requiring an Examination by and a License from a state dental board as a prerequisite to owning, running or managing a dental office, is declared unconstitutional in State v. Brown, 37 Wash. 97, 107 Am. St. Rep. 798. For other authorities to the same effect, see Schnaier v. Navarre Hotel etc. Co., 182 N. Y. 83, 108 Am. St. Rep. 790; State v. Smith, 42 Wash. 237, 114 Am. St. Rep. 114.

A Contract Between an Attorney and one not licensed to practice law that the latter shall procure the employment of the former by third persons for the prosecution of suits to be commenced, and shall assist in procuring witnesses to testify in such suits, in consideration of a share of the attorney's fees collected therein, is held enforceable in Langdon v. Conlin, 67 Neb. 243, 108 Am. St. Rep. 643, and see the authorities cited in the cross-reference note thereto.

STROEMER v. VAN ORSDEL.

[74 Neb. 132, 103 N. W. 1053, 107 N. W. 125.]

ATTORNEY AND CLIENT—Contract to Procure Legislation.—

A contract between a client and his attorney for purely professional services to be rendered by the latter is not invalid because part of the services is the procurement of legislative action by legitimate means, nor because the contract provides for a contingent fee. (p. 720.)

CONTRACTS—Public Policy.—While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught nor held invalid on a bare suspicion of illegality. (p. 722.)

CONTRACTS Between Attorney and Client.—An agreement between attorney and client for professional services to be rendered by the former in collecting facts, preparing and submitting to the proper authorities of the United States government arguments upon the merits of those holding Indian lands purchased from the government for a reduction, and upon the justice and advisability of such reduction of the purchase price of such lands, is valid and enforceable. (p. 723.)

CONTRACTS Between Attorney and Client—Procurement of Legislation.—If, under a contract between attorney and client for purely professional services to be rendered by the former, the attorney in carrying out his contract appears before a committee of both Houses of Congress and explains the nature of a pending bill, and makes arguments in favor of its passage, this does not render the contract void, nor unenforceable. (p. 725.)

CONTRACTS Between Attorney and Client—Procurement of Legislation—Contingent Fee.—If, in the performance of an agreement

for purely professional services between an attorney and client, the attorney ultimately appears before a committee of both Houses of Congress and explains the nature of a pending bill and makes arguments in favor of its passage, the fact that the contract contains an express agreement to perform the professional services for a contingent fee does not render it void. (p. 726.)

L. M. Pemberton, for the plaintiffs in error.

S. Rinaker, R. S. Bibb and Hazlett & Jack, for the defendants in error.

¹³³ ALBERT, C. We shall use the terms "plaintiff" and "defendant" with reference to the title of the cause in the district court.

The plaintiff alleges that he entered into an oral contract with the defendant, whereby he was employed by the defendant as his agent and attorney to take such action and render such services in the way of collecting facts, preparing and submitting to the Indians and the proper authorities of the federal government arguments on the merits of the claims of those holding lands purchased under the act of Congress approved March 3, 1881, providing for the sale of the remainder of the reservation of the confederate Otoe and Missouri tribes of Indians in the states of Nebraska and Kansas, as in the judgment of plaintiff might be necessary and proper to secure from the federal government and said Indians a reduction in the amount which, under the laws of the United States as they then stood, it was necessary to pay to satisfy the unpaid balance due the government by the defendant and other purchasers under said act; that for said services the defendant undertook and agreed to pay the plaintiff a sum equal to ten per cent of whatever such reduction might be obtained. Among other allegations in the petition, of acts done and services performed by the plaintiff in pursuance of said contract, is the following: "That ¹³⁴ thereafter the plaintiff went to Washington City, District of Columbia, and went before the Secretary of the Department of the Interior, and there presented the interests and claims of the defendant and other purchasers of lands under the said act of Congress for a rebate and reduction in the amounts still owing to the government for the said lands. And plaintiff urged upon the Secretary of the Department of the Interior his approval of the consent of said Indians to the said rebate and reduction made by the said Indians, as aforesaid; that as a result of the plaintiff's

presentation of the matter aforesaid to the said Secretary, the said Secretary prepared a bill for an act of Congress, and recommended the passage of the same by Congress, which said bill was for an act approving and ratifying the said action of the said Indians in consenting to the reduction aforesaid, and authorizing the said Secretary to accept payment for said lands in accordance with the reduced terms consented to by the said Indians as aforesaid; that the plaintiff appeared before the committee of the Senate of the United States on Indian affairs, and also before a similar committee of the House of Representatives, and there again presented the interests of the defendant and other purchasers of lands sold under the said act of Congress hereinbefore first mentioned, and urged the claims of the defendant and other purchasers of said lands for a reduction in and a rebate of the amounts due to the government for the lands purchased as aforesaid; that as a result of plaintiff's efforts and services as aforesaid, favorable reports were made by the said committees to their respective bodies upon the said bill, and the same was duly enacted by the Congress of the United States, and approved by the President thereof, and became a law of the United States, April 4, 1900, and thereafter and pursuant to said law the government of the United States accepted from the defendant in full payment for the land occupied by him, as hereinbefore stated, the reduced amount hereinbefore alleged." It is further alleged that, by reason of said services performed by the ¹³⁵ plaintiff in pursuance of said contract, he obtained for the defendant a reduction of two thousand three hundred and seven dollars and eighty-three cents, and that, by reason of the premises, there is now due and owing to the plaintiff from the defendant on said contract the sum of two hundred and thirty dollars and seventy-eight cents. There were a verdict and judgment for the plaintiff, and the defendant brings error.

The principal contention of the defendant is that the contract is illegal and contrary to public policy, in that it was a contract to pay a contingent fee for influencing legislation. In order to understand this contention, it is necessary to refer to some of the circumstances which gave rise to the contract, and what was done by plaintiff in pursuance of it. By the provisions of the act of March 3, 1881, above referred to, with the consent of the Otoe and Missouri tribes of Indians, expressed in open council, the Sec-

retary of the Interior was authorized to survey and to sell the lands of those Indians lying in Nebraska and Kansas. After being surveyed, the lands were to be appraised by three commissioners, of whom one was to be selected by the Indians and two by the Secretary of the Interior. After such survey and appraisal, the Secretary of the Interior was authorized to offer it for sale through the land office at Beatrice, in tracts not exceeding one hundred and sixty acres, to actual settlers or purchasers, who should make oath before the register or receiver at the land office that they intended to occupy the land for authority to purchase which they made application, and who should, within three months after such application, make a permanent settlement upon the same. These sales were to be for cash, or one-fourth in cash to become payable at the expiration of three months from the date of filing the application, one-fourth in one year, one-fourth in two years, and one-fourth in three years from the date of sale. No land was to be sold for less than the appraised value thereof, and in no case for less than two dollars and fifty cents an acre. There was no provision in the act that the land should be sold at public auction. It was similar to a former act of Congress for the sale of a portion of the same Indian reservation, ¹³⁶ in pursuance of which the lands had been sold at private sale; and the settlers proceeded on the theory that the sales under the subsequent act would be conducted in the same manner as those under the former act. But for some reason the officer charged with the sale of the land put it up for sale at auction to the highest bidder. That his action in this respect was unauthorized, and a hardship was thereby entailed on the settlers and purchasers, is shown by a report made by the committee on Indian affairs to Congress, from which we take the following:

“In the total disregard not only of the spirit and letter of the law, but the official assurances after the survey and appraisal of the lands had been completed, to the complete surprise of the intending settlers, the general land office issued an order for a public sale.”

“And the tracts were awarded to the highest bidders therefor at prices greatly in excess of the appraised value.”

That “the sale was controlled by a mob of disorderly, intoxicated and irresponsible persons; and the intending settlers seeking to secure lands of their selection, and on which they had previously made settlement in accordance with the spirit

and purpose of the law, were brought into unfair competition and serious menace from the mob which had gathered for the purpose of speculation and making trouble, and not for the purpose of making actual settlement of the lands through bona fide purchase."

"The commissioner of the general land office was present at the sale, endeavored as best he could to protect the bona fide intending settlers, and assured them, in his official capacity, that no advantage would be taken of the excessive bidding, and that in the end the government would make a fair and reasonable adjustment, and exact no more from the purchasers than the real and appraised value of said lands. The settlers relied upon these assurances, made the bids necessary to secure the lands, and entered upon them": See Report No. 2198, 55th Congress, 3d Session, House Committee on Indian Affairs.

After the sales the settlers made some efforts to obtain ¹³⁷ relief from what was deemed the injustice resulting to them by a sale of the land at public auction instead of at private sale. The merits of their claims were recognized by both the Department of the Interior and by Congress, and on the third day of March, 1893, an act of Congress went into effect, authorizing and directing the Secretary of the Interior "to revise and adjust, on principles of equity, the sales of lands in the late reservation of the confederate Otoe and Missouri tribes of Indians in the states of Nebraska and Kansas, . . . and in his discretion, the consent of the Indians first being obtained, . . . to allow to the purchasers of said lands . . . rebates on the amounts respectively paid or agreed to be paid by said purchasers." This act also provides that the rebates allowed should not bring the price to be paid for the lands below its appraised value. It was after this act went into effect that the contract sought to be enforced in this action was made. At the time the contract was made it was generally understood, and we think properly, that no further legislation was required to enable the settlers to obtain a proper reduction from the amount which they had respectively agreed to pay for the lands. After the contract was made the plaintiff, acting on behalf of the defendant and other settlers, negotiated an agreement with the Indians, whereby they consented that certain reductions might be made to the settlers. This agreement was submitted to the Secretary of the Interior by the plaintiff

for his approval and enforcement, under and in accordance with the act of Congress approved March 3, 1893. The matter was set for hearing, but, before the time for hearing arrived, the plaintiff was taken ill, and was confined to his bed by illness for more than two months. During his illness, the Secretary of the Interior came to the conclusion that there was some doubt as to his authority to proceed under the authority of the act of March 3, 1893, and prepared and submitted to Congress, with his recommendation that it become a law, a bill for an act approving the settlement which the plaintiff had negotiated ¹³⁸ with the Indians. This bill became a law April 4, 1900. While it was pending in Congress, the plaintiff, as the attorney of the defendant and other settlers, appeared and made arguments in favor of the proposed bill before the committees on Indian affairs of both Houses. He emphatically denies that he solicited any member of Congress to support the bill, or used or tried to use his personal influence with any of such members to secure its passage. It appears from his testimony, which is uncontradicted, that, after his contract with the defendant, the only conversations had by him with individual members of Congress in regard to the bill was to inquire on one or two occasions as to its progress, and to answer questions addressed to him by two members as to the nature and object of the bill.

It is insisted that the case falls within the rule announced in *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294, which is as follows: "A contract by which a person agrees to draft a bill, have it introduced in a legislature, explain it to and make arguments in its favor before committees of the legislature, and do all things needful and proper to secure its passage; such party to receive no compensation unless the passage of the bill, an appropriation act, is procured—if successful, the fees not fixed, but to be liberal—is vicious, illegal and void; and, in the event of the passage of the bill, there can be no recovery of a fee in a suit upon the contract, nor as upon an implied contract, nor a quantum meruit for the services performed."

On the other hand it is claimed that there is nothing on the face of the contract to show that it contemplated legislative action; that the facts stated show that such action was not within the contemplation of the parties when the

contract was made, and therefore that it was not a contract to procure legislation. But we think the plaintiff should be held to the interpretation which he himself placed upon the contract. By the express terms of the contract, he was to render such services in the way of collecting ¹³⁰ facts, and preparing and submitting to the proper authorities of the government of the United States arguments upon the merits of the claims, as in his judgment might be necessary and proper. It appears from that portion of the petition hereinbefore quoted that, among the services which the plaintiff deemed "necessary and proper" in the premises, was to appear before the committees of the two houses of Congress in support of the proposed bill. It further appears that as a result of his services favorable reports were made by such committees upon the bill, and that it was duly enacted by Congress and approved by the president. These facts show, we think, that the contract, as construed by the plaintiff, brings it clearly within the rule announced in the Richardson case (59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294). But after a careful examination of the authorities, we are all of the opinion that the rule in that case is stated too broadly. It is stated more broadly than was necessary to cover that case, the record of which shows a persistent and successful attempt to influence legislation by means of personal influence and solicitation of individual members of the legislature. It is thought a more accurate statement of the rule is to be found in *Trist v. Child*, 21 Wall. (U. S.) 441, 22 L. ed. 623, where it is said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character."

From a comparison of this rule with that stated in the Richardson case (59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294), waiving for the present the question of contingent fees, it will be seen that the latter places all contracts for the employment of agents and attorneys to secure legislation under the ban, while under the former, under certain circumstances and within proper limits, such

contracts are valid. The rule announced in *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623, above set out, has been frequently recognized by the supreme court of the United States and by state courts of last resort: *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Oscanyan v. Winchester R. Arms Co.*, 103 U. S. 261, 26 L. ed. 539; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Sedgwick v. Stanton*, 14 N. Y. 289; *Bremsen v. Engler*, 49 N. Y. Sup. Ct. 172; *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Denison v. Crawford County*, 48 Iowa, 211. The case last cited, owing to its similarity to the case at bar, deserves more than passing notice. There a contract had been entered into between the plaintiff and the defendant county, providing that the plaintiff should make application to the federal government for certain swamp lands, or indemnity therefor, which the county claimed it was entitled to receive, and Denison was to receive for his compensation one-half of what he thus procured. To effect the object of the contract required an act of Congress. The county received the indemnity contemplated by the contract, and the plaintiff brought suit for his fee under the contract. The contract was upheld by the court in an opinion which states the rule applicable to such cases in substantially the same language as that used in *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623. In most, if not all, of the cases cited, however, the courts add this qualification: That if the agent or attorney conceals from the members of the legislative body the capacity in which he is acting, or appears to be other than he actually is, legislation procured thereby may be said to have been obtained by improper means, and a contract to pay a compensation therefor is void as against public policy. In the present case the plaintiff is an attorney at law, and made no attempt to conceal the capacity in which he was acting, or to be other than what he actually was. Hence, the case does not fall within that qualification.

It has been held in some cases that where the fee is contingent, as in this case, there is a strong temptation on the part of the agent or attorney to make use of improper means to effect the desired end, and for that reason a contract¹⁴¹ to render services before an executive officer of the government, or a legislative body, for a contingent fee is contrary to public policy. In the *Richardson* case (59 Neb. 400,

80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294), considerable stress is laid on this feature of the contract. We do not share the view that such feature of the contract renders it void as against public policy. If the temptation to resort to improper methods is too strong for an attorney, working for a mere fraction of the benefits resulting from his services, it would certainly be far stronger to the real party in interest working in his own behalf and for the whole of the benefits, yet no one questions the right of the party to act in his own behalf in such matters. It would seem to us that to the extent that a contingent fee increases the temptation to the agent or attorney, it diminishes the temptation to the client, so that the sum total of the temptation to employ improper means is unaffected by the character of the fee. Besides, the right of an attorney at law to render services in court for a contingent fee is almost universally recognized in this country. The temptation to resort to improper means before the judiciary is just as strong as it is to resort to such means before the legislative or executive branch of the government, and we have no right to assume that such means would be any more effective in one department than in another. The supreme court of the United States has held more than once that a contract between an attorney and client is not rendered invalid by a provision for a contingent fee. In *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. Rep. 441, 28 L. ed. 64, passing upon the validity of such contract, the court said: "It was decided in the case of *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well-known difficulties and delays in obtaining payment of just claims, which are not within the ordinary course of procedure of the auditing officers of the government, justify a liberal compensation in successful cases, ¹⁴² where none is to be received in case of failure. Any other rule would work much hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights."

A contract, whereby an attorney undertakes to procure a pardon for one convicted of crime is not invalid because

the compensation is made contingent on success: *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060. On the validity of such contracts generally see, also, *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320, and *Denison v. Crawford County*, 48 Iowa, 211; *Wylie v. Coxe*, 15 How. (U. S.) 415, 14 L. ed. 753; *Barber Asphalt Paving Co. v. Botsford*, 56 Kan. 532, 44 Pac. 3; *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. 730; *Sedgwick v. Stanton*, 14 N. Y. 289; *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532; *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346.

In the light of the authorities cited, we are unable to see wherein the contract in suit contravenes any rule of public policy either as to the nature of the services contemplated by the parties when the contract was made or those rendered in pursuance of it. It is not sufficient to say that the plaintiff might have resorted to illegal or improper means to attain the end contemplated by the contract; that might be said in any case. But the public interest is not well served by indulging baseless suspicions of wrongdoing. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught or held invalid on a bare suspicion of illegality. Had the defendant done for himself all that is shown the plaintiff did for him in pursuance of the contract, it would have been what is everywhere recognized as a legitimate exercise of his rights as a citizen. If it were competent for the defendant to do those things in his own behalf, we are unable to see why the services of one employed to act for him should be held illegal or contrary to public policy.

Complaint is made of some of the instructions, but such ¹⁴³ complaint appears to be disposed of in what has already been said.

It is recommended that the judgment of the district court be affirmed.

Duffie and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The following opinion on rehearing was filed March 8, 1906:

BARNES, J. Our original opinion in this case, ante, p. 714, affirms the judgment of the trial court, and holds that the contract on which this action was based is valid and enforceable. A rehearing has been allowed; the case has been presented to the court by oral argument and on printed briefs, and the question now is, Shall we adhere to that opinion? It is stated therein: The contract in question, as construed by the plaintiff in the court below, is clearly ¹⁴⁴ within the rule announced in the case of Richardson v. Scott's Bluff County, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294. Using that expression as a foundation for his contention, counsel for the defendant now strenuously insists that our decision is wrong; that it should be set aside, and the judgment of the trial court reversed, because the contract is one to secure legislation, in other words, is a lobbying contract, and void as against public policy. We are convinced, however, that the statement above is incorrect, and is not fully justified by the record. The contract in question, set forth in the petition of the plaintiff in the court below, is as follows:

"The plaintiff and the defendant entered into an oral agreement, whereby the defendant employed the plaintiff to act for the defendant as his attorney and agent to take such action and render such services in the way of collecting facts, preparing and submitting to the Indians and proper authorities of the government of the United States arguments upon the merits of the claims of those holding lands purchased from the government, as aforesaid, for a reduction, and upon the justice and advisability of such reduction to and for all concerned as in the judgment of the plaintiff might be necessary and proper to secure from the government of the United States, and the said Indians, a rebate or reduction in the amount which, under the laws of the United States as they then stood, it was necessary to pay to the government of the United States to satisfy and extinguish the unpaid balance due the government of the United States for the said land under the terms of the said sale to the said defendant; that as a part of said agreement, and to induce the plaintiff to undertake the task of securing a reduction of, or rebate upon, the payment required to be made, as aforesaid, for the said land to the government of the United States, the defendant at said time orally agreed with, and promised to the plaintiff to pay to the plaintiff

a sum of money equal to ten per cent of the reduction or rebate which the plaintiff might secure of or upon the amount due the government as aforesaid, and the plaintiff at said time, as a part of said agreement, ¹⁴⁵ orally promised and agreed to and with the defendant to undertake to secure a rebate upon or reduction of the amount remaining to be paid to the government for the said land as aforesaid; that it was further at the said time orally agreed by and between the plaintiff and the defendant that the sum of money to be paid by the defendant to plaintiff, as aforesaid, should be due and payable from the defendant to the plaintiff as soon as the said reduction or rebate was secured, and the government of the United States accepted the reduced amount in full payment for said land."

It is apparent from reading the contract that it is valid on its face, and one that the parties had a right to make. It contains no agreement, in terms, to procure legislative action, and it is quite clear from the record that no such action was considered necessary, or was in any way contemplated, by the parties thereto at the time it was made. It appears that, after the plaintiff below had obtained the consent of the Indians to a reduction of the price of their lands, as contemplated by the agreement, and when such consent was presented by the plaintiff to the Secretary of the Interior for his approval, that officer was also of opinion that he had the power to make the necessary orders to close up the transaction, under the authority of the act of Congress of March 3, 1893, referred to in our former opinion; and it would seem that, when the Secretary had approved of the reduction sought by the plaintiff, and agreed to by the Indians, the plaintiff had performed, as far as he could, the services contemplated by the parties when the contract was made. That such an agreement was perfectly legitimate, and the services thus performed were proper, there can be no doubt. It is shown that it was the Secretary of the Interior that originated the idea that additional legislation should be had, giving him further power, before making his final order approving of the agreement of the parties and granting the rebate in question. He therefore, on his own motion, and without suggestion of the plaintiff, prepared a bill for that purpose, ¹⁴⁶ and had it submitted to Congress. So it may be said that when, as stated in the contract, it was agreed that the plaintiff should take such ac-

tion and render such services as in his judgment might be necessary and proper to secure such rebate from the government and the said Indians, it was not within the mind of either of the parties that legislative action would be required, and services of that kind were not intended to be contracted for.

In *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294, the contract was: "To draft a bill, have it introduced in the legislature, explain it to and make arguments in its favor before committees of the legislature, and do all things needful and proper to secure its passage; such party to receive no compensation unless the passage of the bill, an appropriation act, is procured—if successful, the fees not fixed, but to be liberal." By a comparison of the contracts it clearly appears that they are not in the same class; that one is a legitimate contract for professional services, where legislative action is not contemplated or contracted for, while the other is an agreement to procure legislative action, to wit, the passage of an appropriation bill, by drafting the bill itself, having it introduced in the legislature, and doing all things necessary, including lobbying, to procure its passage. That such an agreement is a lobbying contract, is against public policy, and falls within the rule announced by the courts in the cases relied on by counsel for the defendant, there can be no doubt.

In order to dispose of the whole question, it only remains for us to consider the nature of the services performed by the plaintiff in carrying out his part of the agreement. It is insisted by counsel for the defendant that such services were illegal, opposed to considerations of public policy, and were void; that plaintiff cannot recover for such services, and by their performance the contract is brought within the rule last above stated. We are unable to give our assent to this view of the matter. It appears that the services performed by the plaintiff up to and including the time when he had secured the approval ¹⁴⁷ of the Secretary of the Interior to the agreement of the Indians granting a rebate or reduction of the price of the land in question were strictly legitimate and proper, and were such professional services as were evidently contemplated by the contract. It further appears that it was the Secretary of the Interior who first suggested a desire on his part for additional legislative au-

thority before completing the transaction. The plaintiff did not frame the bill which was presented to Congress, it was drawn by the Secretary of the Interior, who also procured it to be introduced before both Houses of Congress. It appears, however, that thereafter the plaintiff was called, or at least appeared, before a committee of each House, and explained the nature of the bill, and informed them of its purpose and effect. This service he performed in a proper manner, and it is not shown that he influenced, or attempted to influence, any member of Congress in order to secure the passage of the bill. The services thus performed by the plaintiff, it would seem, were purely professional in their nature, and fall within the rule announced in *Trist v. Child*, 21 Wall. (U. S.) 441, 22 L. ed. 623. They are within the category of preparing and presenting arguments, and submitting them to a legislative committee or other proper authority. And if the contract contained an express agreement to perform such services for a contingent fee, such agreement would not render it void. So we are of opinion that the conclusion announced by our former decision is right, but that the expression that the contract herein falls fully within the case of *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294, should be, and it is hereby, disapproved. We are satisfied, however, with our modification of the rule in that case, and again give it our approval.

For the foregoing reasons, our former opinion is adhered to.

Affirmed.

VALIDITY OF LOBBYING CONTRACTS.

I. Introductory, 726.

II. General Principles Controlling, 727.

III. Illustrations, 730.

I. Introductory.

The books are full of cases which in general terms condemn as against public policy "lobbying contracts," or contracts for "lobby services." A contract which is contrary to public policy is undoubtedly void, and it is equally true that an agreement based on services to be rendered by an agent or attorney, the tendency of which would be to unduly influence or corrupt legislation is against public policy, and cannot be enforced. On these two propositions the courts are unanimous. But it must not be inferred that every contract for services to be rendered which have as their object influencing

members of a legislative body to secure the passage of any given bill is necessarily a lobbying contract which falls under the judicial ban. If the methods used to influence legislation are those which appeal to reason, there certainly should not be, and there is not, any law which denounces them or forbids the enforcement of contracts based on such services. The difficulty is in drawing the line of demarcation between lobbying contracts which are offensive to the law and those which are not. The term "lobbying contracts," which is applied to all contracts based on the consideration of influencing legislation, is hardly capable of exact legal definition, but we will give the general principles controlling contracts classed under this head, and show by the adjudications in numerous cases that have been before the courts how these general principles have been applied. In this way only, we think, can a correct idea be obtained of when contracts for lobby services can be upheld, and when they must be condemned by the courts.

II. General Principles Controlling.

It is an elementary principle of law that a contract must not only be valuable, but it must be lawful. A contract for services to be rendered by an agent or attorney before a legislative body in securing the passage of a measure, is not unlawful if it does not contemplate the use of improper means, and if the services to be rendered are such as appeal to the reason of those whom it is sought to influence. But personal solicitation among the individual members is not considered as proper means, even though no deception is practiced, for the reason that whatever is laid before a legislative body in writing or spoken openly in its presence, or that of a committee, can be refuted if false, while private arguments used secretly with individual members are beyond the reach of correction. This general doctrine is laid down by Judge Cooley in his work on Constitutional Limitations (sixth edition, page 163): "A lawyer may be entitled to compensation for writing a petition, or even for making a public argument before the legislature or a committee thereof; but the law should not help him, or any other person, to a recompense for exercising any personal influence in any way in any act of legislation. It is certainly important to just and wise legislation, and therefore to the most essential interests of the public, that the legislature should be perfectly free from any extraneous influence, which may either corrupt or deceive the members or any of them." This doctrine has also been sanctioned by the highest court of our country, for in *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623, an attorney had been employed to secure passage of an act of Congress providing for the payment of a claim against the government. Though the contract in this case was held illegal, the court said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within the category are included

drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable." But the contract in this case was declared void because, as announced by the court, there is "a broad line of demarcation" between the principles above stated and "personal solicitation." There are, it is true, a few cases (which will be hereafter cited) holding that personal solicitation of the members of a legislature in behalf of a pending bill does not render the contract of employment invalid, when no deception had been practiced, but these cases are so opposed to the great weight of authority that they cannot be considered as changing the general rule, that personal influence exerted over the individual members of a legislature will vitiate a contract the consideration of which is the procurement of legislative action. Another general principle is that an agent or attorney employed to influence legislative action must disclose the representative capacity in which he is acting, for if any sinister methods are contemplated by the contract under which he is employed, he will forfeit any right to enforce such contract. This principle is clearly stated by Mr. Justice Grier in *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How. (U. S.) 314, 14 L. ed. 953, as follows: "It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Legislators should act from high considerations of public duty. Public policy and sound morality do, therefore, imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided. All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true character, so that their arguments and representations, openly and candidly made, may receive their first weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature."

There is another rule given by many writers as one of universal application, namely, that a contract for services of the character under consideration is void if the compensation stipulated for is contingent upon success. Undoubtedly the language used in a majority of the cases announces this doctrine, giving as the reason therefor that contingent compensation necessarily tends to the employment of improper means. But a careful examination of these cases will show that in nearly, if not in all, of them the services rendered were illegal, because opposed to one of the other general principles heretofore stated, and while there is much reason in the contention that large contingent fees tend to make those so employed use secret and unfair means to secure success, still there is such high authority to the effect that contracts of this class are not unlawful merely because the compensation is contingent, that we are unwilling to sanction a statement that, as a general rule, such contracts are contrary to public policy, and void simply because the compensation is contingent. We prefer to give the cases where this question has been raised, with the remarks of the courts both in favor of and against the legality of such contracts. The broad statement, too, has sometimes been made that all such contracts are void when they contemplated the use of money to influence legislation, but this is subject to qualification, for as was said by the court in *Kansas Pacific Ry. Co. v. McCoy*, 8 Kan. 538: "The use of money to influence legislation is not always wrong. It depends altogether upon the manner of its use. If it is to be used for the publication of circulars or pamphlets, or otherwise, for the collection or distribution of information openly and publicly among the members of the legislature, there is nothing objectionable or improper. But if it be used directly in bribing or indirectly in working up a personal influence upon individual members, conciliating them by suppers, presents, or any of that machinery so well known to lobbyists, which aims to secure a member's vote without reference to his judgment, then it is not only illegal, but one of the greatest infractions of social duty of which an individual can, under the circumstances of the present day, be guilty. It deserves not merely the condemnation of the courts, but the scorn and scourging of every honest citizen. It is the way of death to Republican institutions." In using the above language the court held that a charge requested in the lower court, that if the jury believed from the evidence that a part of the consideration of the contract was that the plaintiff should use money or other illegal means to influence legislation was properly refused without the qualifications above stated. There is some diversity of opinion as to what construction should be placed on a contract for lobby services when such contract does not in terms stipulate for the employment of improper methods. The law, of course, does not presume that a person intends to violate its provisions, and the general principle controlling the construction of contracts for lobbying when the contract itself does not in terms stipu-

late for improper means seems to be that it will be upheld, unless the use of such means appears by necessary implication. Though this rule is fully borne out by the cases, as we shall hereafter see, it is undeniably true that in a few cases the courts have been disposed to look with great disfavor upon all contracts where the consideration was for services to influence legislation; it having been said by Mr. Justice Field in *Providence Tool Co. v. Morris*, 2 Wall. 45, 17 L. ed. 868: "It is sufficient to observe generally that all arguments for pecuniary consideration to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of this country." This language of Justice Field, however, was called forth in a case where an effort was being made to collect on an agreement for compensation to procure a contract from the government to furnish its supplies. The peculiar facts in the case probably prompted strong language of condemnation from the eminent jurist, but its strict application to all cases involving contracts having for their purpose controlling "the ordinary course of legislation" has not been generally followed by either the state courts or the supreme court of the United States. The application of all the general principles above given are shown by the following cases, and as each case embraces several of these general rules, and they are inseparably discussed in the opinions, we will not attempt to segregate the cases under separate headings, as this would necessarily involve useless repetition.

III. Illustrations.

In *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659, the contract provided that an attorney was to go to Washington City "and do all in his power to prevent the confirmation of Eslava's claim," and contained a further provision that he was to endeavor to obtain the passage of an act favorable to the claim of his client. This contract was held not to be void as against public policy, but as a recognition of the general rule regarding lobbying contracts, the court remarked: "It is very clear that a contract by which one engaged to procure the passage of a law by sinister means or by personal influence, etc., or by concealment of anything necessary to be known to the formation of a correct judgment, would be contrary to public policy and void."

The case of *Wood v. McCann*, 6 Dana (Ky.), 366, is a leading one, and has been quoted by nearly all of the subsequent cases involving such contracts as are now under consideration. Here the court was reviewing a default judgment rendered in favor of respondent against appellant upon a note, the consideration of which was for services rendered by respondent in securing the passage of certain bills before

the legislature. The agreement did not in terms specify the nature of the services to be rendered nor whether the compensation was to be contingent. Said the court: "If Mr. McCann exerted, or agreed to exert, any personal influence, foul or fair, in procuring the legislative acts described in his declaration, we have no doubt that the note on which he procured the judgment now under revision possessed no legal obligation. But unless the fact that some such exertion of influence was a part of the consideration of the note is clearly deducible from the terms of the contract, or the averments in the declaration, we should not judicially decide that the contract was illegal. . . . And had these shown that the fee, or any portion of it, depended on the passage of the legislative acts or either of them, we should be clearly of the opinion that the contract should be deemed illegal and void; because a contingent fee is a direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature. . . . Contingent fees for professional services in courts of justice have been, when not champertous, tolerated by usage and custom; and their validity depends on principles not applicable to the like fees for exertions made with the legislature." Speaking of the evil tendencies of exercising personal influence over members of the legislature and the illegality of contracts based on such services, it is said in *Frost v. Belmont*, 6 Allen, 152: "By the regular course of legislation, organs are provided through which any parties may fairly and openly approach the legislature, and be heard with proofs and arguments respecting any legislative acts which they may be interested in, whether public or private. These organs are the various committees appointed to consider and report upon the matters to be acted upon by the whole body. When private interests are to be affected, notice is given of the hearings before these committees; and thus opportunity is given to adverse parties to meet face to face, and obtain a fair and open hearing. And though these committees properly dispense with any of the rules which regulate hearings before judicial tribunals, yet common fairness requires that neither party shall be permitted to have secret consultations and exercise secret influences, that are kept from the knowledge of the other party. The business of 'lobby members' is not to go fairly and openly before the committees, and present statements, proofs and arguments that the other side has an opportunity to meet and refute, if they are wrong, but to go secretly to the members, and ply them with statements and arguments that the other side cannot openly meet, however erroneous they may be; and to bring illegitimate influences to bear upon them. If the 'lobby member' is selected because of his political or personal influence, it aggravates the wrong. If his business is to unite various interests by means of projects that are called 'log-rolling,' it is still worse."

A case which goes very far in holding contracts illegal whose consideration is based on services rendered in procuring legislation is

that of *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493, 61 N. W. 898, 30 L. R. A. 737. In this case the plaintiff had acquired valuable information in regard to certain pine lands in the state of Wisconsin, and entered into an agreement with the defendant whereby the defendant was to enter the land, which was not then in market or subject to entry, and to hold the same until the plaintiff could, for a valuable consideration, to be paid by the defendant, procure such legislation from Congress as would enable defendant to purchase the land from the government. The plaintiff performed his part of the agreement and procured the necessary legislation. Defendant refused to pay as agreed, and plaintiff brought action to recover the amount specified in the contract. The contract was declared void as against public policy. It is difficult to see upon what ground, however, this decision rests. The evidence showed that the plaintiff attended sessions of Congress for four years, appeared before its committees and, not being himself an attorney, employed counsel to urge the passage of the necessary legislation. No personal solicitation of the members of Congress or of the officers of the Interior Department were shown. In fact, the carrying out of the contract did not require the use of such methods, for it was a mere agreement to promote the enforcement and application of existing laws and established regulations of the Interior Department to existing conditions, so that persons having a right to select and acquire lands under the public domain might exercise such right; and these duties required only the collection of facts and making arguments thereon in respect to the legal status of the lands under the circumstances and the rights of persons under existing laws to acquire such lands. The court was evidently of the opinion, however, that such persistent attendance upon Congress, covering a period of four years, must have resulted in bringing personal influence to bear upon its members before the necessary legislation was secured. The ruling in this case is criticised unfavorably in the somewhat similar case of *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928, 67 N. W. 715, 33 L. R. A. 166. Here the contract was to furnish the defendant with the minutes of desirable public lands upon which to locate, to instruct him as to what he should do as a settler on such lands in order to secure priority under the land laws of the United States, and to do all that was necessary and could be done to bring the lands into market and enable defendant to acquire title thereto. In enforcing the contract the court, after stating the general doctrine that "All agreements which tend to introduce personal influence and solicitation as elements in procuring and influencing legislative action, or action by any department of the government, are contrary to sound morals, lead to inefficiency in the public service, and come under the condemnation of the rule here under consideration," added: "The intention of the parties must be gathered from the language they used, from the contract actually made, in the light of attending circumstances, the same as any other case. If properly

construed, it does not, by its terms, or by necessary implication, contain anything illegal or tend to any violation of sound morals; the fatal element should not through an overzealous desire to fortify against the deplorable effects of lobbying contracts, strictly so called—which all recognize and should unhesitatingly condemn—be injected into it by mere suspicion and conjecture that the parties intended to do some illegal act or a legal act by illegal means, or that the agreement might have probably led to improper influences upon, or tampering with, official conduct, and thereby defeat the contract. It is sometimes lost sight of that the presumptions in human affairs are in favor of innocence rather than guilt, and that such rule applies in testing such a contract as we have here by the principle of sound morals.” In referring to the cases of *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493, 61 N. W. 898, 30 L. R. A. 737, and *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868, the court was of the opinion that the ruling in the former must have rested, not on the contract, but on what was done under it before it was entered into; and in the latter that the decision rested upon acts in themselves contrary to public policy or those which by necessary implication required or contemplated the resort to methods having a corrupting tendency. In *Richardson v. Scott’s Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294, an attorney was employed to prepare a suitable appropriation bill, to argue its merits before the proper legislative committees, and do all things needful and proper to procure its passage, and was to be paid a very liberal fee if successful. The contract was held vicious and illegal. The attorney in this case was a woman, and the ruling is strongly in contrast to that of the case of *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60, where the agent and attorney (a woman), besides preparing the bill and arguing it before one of the committees of the legislature, also made personal solicitation among the members. It was contended that as a portion of the services rendered in connection with the passage of the act consisted of personal solicitation of individual members of the legislature, and was therefore contrary to public policy, that the legitimate services rendered by her were tainted with the vice, and that therefore there could be no recovery under the contract. Said the court: “Now, while the evidence does show that the plaintiff endeavored to persuade some of the members of the legislature, individually, to act favorably upon the bill she was seeking to have passed, it does not show that she used any dishonest, secret or unfair means to accomplish her object. Besides, if she did not tell them that she was acting as an agent for pay, they must have known from the character of the bill that she was acting as the agent of Dr. Cogswell, which fact was sufficient of itself to disclose her motive.” The language used in this case justifies the conclusion that if the fee had been contingent, no recovery would have been allowed; but on the other points decided, namely, personal solicitation of individual members and

failure to disclose the representative capacity in which the agent appeared, is so contrary to the general weight of authority that this case is worthy of special notice. True, the court in this case refers in its opinion to the definition of the word "lobbying" given by the California statute, but the decision certainly goes further in upholding this class of contracts than any other which has come under our notice.

In a later decision than that of *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294, the supreme court of Nebraska have refused to place too strict a construction upon the rule announced in the *Richardson* case, for in *Stroemer v. Van Orsdel*, 74 Neb. 132, ante, p. 713, 103 N. W. 1053, 107 N. W. 125, 4 L. R. A., N. S., 212, an attorney entered into a contract to act as agent and attorney, to take such action and render such service, preparing and submitting to the Indians and the proper authorities of the federal government arguments on the merits of the claims of those holding lands purchased under a former act of Congress. In addition to interviewing the Indians and obtaining their consent to the reduction of the amount which was necessary to be paid to satisfy the unpaid balance due the government, he visited the secretary of the Interior and presented the interests and claims of the purchasers for a rebate and reduction, and afterward appeared before the committees of the Senate and House and urged the passage of a bill drawn by the Secretary of the Interior recommending passage of the bill. As a result of his efforts the bill was favorably recommended by the committees and was enacted into law. Under the contract the fee was contingent and payment was refused for the reason that, upon that and other grounds, the contract was illegal and contrary to public policy under the ruling laid down in *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682, 81 N. W. 309, 48 L. R. A. 294. In upholding the contract, the court said: "It has been held in some cases that, when the fee is contingent, as in this case, there is a strong temptation on the part of the agent or attorney to make use of improper means to effect the desired end, and for that reason a contract to render services before an executive officer of the government or a legislative body for a contingent fee is contrary to public policy. In the *Richardson* case (*supra*), considerable stress is laid on this feature of the contract. We do not share the view that such feature of the contract renders it void as against public policy. If the temptation to resort to improper methods is too strong for an attorney working for a mere fraction of the benefits resulting from his services, it would certainly be far stronger to the real party in interest working in his own behalf and for the whole of the benefits; yet no one questions the right of a party to act in his own behalf in such matters. It would seem to us that to the extent that a contingent fee increases the temptation to the agent or attorney it diminishes the temptation of the client, so that the sum total of the temptation to

employ improper means is unaffected by the character of the fee. Besides, the right of an attorney at law to render services in court for a contingent fee is almost universally recognized in this country. The temptation to resort to improper means before the judiciary is just as strong as it is to resort to such means before the legislative or executive branch of the government, and we have no right to assume that such means would be any more effective in one department than in another." On the other contention raised in this case, that the contract was contrary to public policy, the court said: "It is not sufficient to say that the plaintiff might have resorted to illegal or improper means to attain the end contemplated by the contract. That might be said in any case. But the public interest is not well served by indulging baseless suspicions of wrongdoing. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught or held invalid on a bare suspicion of illegality. Had the defendant done for himself all that is shown the plaintiff did for him in pursuance of the contract, it would have been what is everywhere recognized as a legitimate exercise of his rights as a citizen. If it were competent for the defendant to do those things in his own behalf, we are unable to see why the services of one employed to act for him should be held illegal, or contrary to public policy." On a rehearing granted in this case (107 N. W. 125), the court refused to change its former opinion.

A somewhat different doctrine is announced in *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535, the plaintiff being required, under the contract sued on in this case, "to give all the aid in his power, spend such reasonable time as may be necessary, and generally to use his utmost influence and exertions to procure the passage into law the bill heretofore introduced into the Senate of the state of New York." "It is not necessary," said the court, "to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices, to influence legislative action," and the contract was declared void as contrary to public policy.

In *Rose v. Truax*, 21 Barb. (N. Y.) 361, the argument was that the plaintiff should "use his influence, efforts, and labor to procure the passage of a law by the legislature," and the contract was held void; the evidence in this case, however, showed that personal solicitation had been employed. In *Weed v. Black*, 2 McAr. (D. C.) 268, 29 Am. Rep. 618, it is said that "if the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself, nor will honest services substantially performed sanctify an unlawful contract"; and the learned judge further asserts that "all contracts for

services, generally, in procuring legislation, are void from public policy, and it is the duty of the courts so to declare''; but cites as his authority for these remarks the cases of *Marshall v. Baltimore R. R. Co.*, 16 How. (U. S.) 314, 14 L. ed. 453, *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623, and *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868; but as we have seen by an examination of these three cases in a former part of this note, none but the last sustain the doctrine for which they are referred for support, but that, on the contrary, both the *Trist* case and the *Marshall* case distinctly hold that such contracts are not invalid as contrary to public policy if they do not tend to the exercise of secret or improper influences.

In *Russell v. Burton*, 66 Barb. 539, plaintiff had been employed by defendant to act as agent for the latter, and to give his attention and services in and about making, preparing and presenting a certain claim which defendant had against the state, before the legislature, and in preparing and perfecting a bill to be presented before said legislature for the settlement and payment of such claim. In addition to stipulating that plaintiff was to attend before the proper committees of both Houses prepared to argue in favor of the bill the contract provided that he ''should do all that was necessary and proper to be done to insure its passage,'' and his fee was to be contingent on success. The defendant claimed the contract was for ''lobby services,'' and therefore void, but this contention was not sustained, the court holding that the contract was not of itself and by its terms necessarily illegal.

In *Milbank v. Jones*, 127 N. Y. 370, 24 Am. St. Rep. 454, 28 N. E. 31, the general principle is clearly upheld that contracts for influencing the deliberations of legislative bodies by arguments openly made and bearing directly upon the merits of a pending measure, are lawful, and that when such contracts are not in terms and upon their face against public policy, they should be enforced. Hence, in this case plaintiff was allowed to recover a certain sum of money which the defendant held in trust under an agreement that it was to be returned to the plaintiff if a certain resolution was not passed by the board of aldermen and common council of the city of New York, and a motion by the defendant to dismiss the action because the purpose of the contract was to improperly influence legislation, and therefore void, was refused. In *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519, defendant had agreed to pay the plaintiff a fixed sum on condition that he succeeded in procuring the passage of a certain act before the legislature. Plaintiff spent much time in going before the proper committees, and explaining the bill, and succeeded in securing its passage. Upon refusal of the defendant to pay the compensation as agreed, plaintiff brought suit for its recovery, and obtained judgment in the lower court, but, on appeal, Judge Rogers, speaking for the court, referred to other cases as upholding that ''the law will not aid in enforcing any contract that is illegal or the consideration of

which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil or political institutions of a state. That a contract to procure, or to endeavor to procure, the passage of an act of the legislature by any sinister means, or even by using personal influence with the members, would be void, as being inconsistent with public policy and the integrity of our political institutions. And any agreement for a contingent fee to be paid on the passage of a legislative act would be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influence to effect the object''; and continued: ''These are broad fundamental principles to the truth of which we subscribe. . . . It matters not that nothing improper was done, or expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy; leading necessarily in the hands of designing and corrupt men, to improper tampering with members and the use of extraneous secret influences over an important branch of the government.'' A similar doctrine is stated in *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677, where it is said: ''Courts of justice have, with jealous care, endeavored to protect every branch of the government from all illegitimate and sinister influences and agencies; and it has been settled by a series of decisions, uniform in their reason, spirit and tendency, that an agreement in respect to services as a lobby agent, or for sale by an individual of his personal influence and solicitation to procure the passage of a public or private law by the legislature, is void as being prejudicial to sound legislation, manifestly injurious to the interests of the state, and in express and unquestionable contravention of public policy.'' And speaking particularly of the personal solicitations proven to have been made in this case, the court continued: ''The law lends no sanction or support to contracts for such services, but leaves the party who seeks the wages for his services to rely on the honorary obligation alone. It is not within the province of courts to balance or adjust the equities growing out of such transactions.''

In *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55, the contract was that plaintiff should prosecute and superintend defendant's claim against the state, such claim to be brought before the legislature in such mode as the plaintiff, as agent and attorney, might choose to have the same presented, the fee to be contingent upon passage of the act. Whiton, C. J., said: ''We are of opinion that no action can be maintained upon it, because the consideration for the promise of the defendant was contrary to public policy. It is certainly contrary to public policy to authorize or encourage the use of improper influences with the legislature to procure the passage of a law; and contracts which have been made for the payment of money, in consideration that the promisee would use such influences, have uniformly been declared void; and the contract by which the person to whom the

money was to be paid bound himself to use his influence and personal solicitation with the members has always been held to be of this description. The reason is, that it is important to just legislation and most essential to the public interest that the members of the legislature should be free from any influences which might deceive and corrupt them. A person may lawfully make a public argument before a committee of the legislature, or before the legislature itself, if he should be permitted to do so, in favor of or against a public or private act of the legislature; and an agreement by which he was promised to be paid for such a service could be enforced, because a public discussion could not tend to deceive or corrupt the legislature, while personal solicitation and influence might produce that result. We have had some difficulty in determining that the contract sued upon in this case was a contract which stipulated for the use of influence of the plaintiff with the members of the legislature in favor of a law allowing to the defendant his claim for services, but, upon reflection, we think that to be the case. The plaintiff was to prosecute and superintend the claim before the legislature. How could this be done without resorting to personal solicitation with the members? We know of no way by which a person, who is not a member of the legislature, can prosecute or superintend a claim before that body, except by means of the members themselves, or some of them. He could not, therefore, comply with the contract or his part without resorting to personal solicitation with the members of the legislative body. We therefore think that the contract was by its terms an agreement to pay money for a consideration which is inconsistent with public policy, and that the agreement is for that reason void." Much of the force that might otherwise be attached to the reasoning in this case is weakened by a later decision of the same court in *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928, 67 N. W. 715, 33 L. R. A. 166, where the policy of injecting into a contract of this kind, by mere suspicion, that the parties intended to do some illegal act or a legal act by illegal means, or that the agreement might lead to the use of improper influences, is strongly condemned. In *Marshall v. Baltimore & Ohio R. R.*, 16 How. (U. S.), 314 14 L. ed. 953, the railroad company had agreed to give fifty thousand dollars, contingent upon the agent obtaining from the legislature of the state of Virginia the grant of certain rights of way, and it was said by the court: "Bribes in the shape of high contingent compensation must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means'; and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy

corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public or private, a compact corps of venal solicitors, vending their secret influence, will infest the capital of the Union, and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us, as of Rome, "Omne Romae venale."

There is no doubt but enormous contingent fees, such as were offered in the above case, are great temptations to those who covenant for them, and that in cases like the above, especially where the agent fails to disclose his representative capacity, the courts should not uphold them. The strong condemnation of such fees and the dire results predicted in the above case by Justice Grier have probably been largely influential in causing a majority of the state courts to declare that any contract for influencing legislation which is based on a contingent fee, is illegal; and has led many writers on the subject under consideration to state, as a general principle regarding lobbying contracts, that they are vitiated when the compensation is contingent. We have already given a number of illustrations, however, showing that such rule is not universal, and it has even been condemned by the supreme court of the United States in a later case than that of *Marshall v. Baltimore & O. R. R.*, 16 How. (U. S.) 314, 14 L. ed. 453, for in *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. Rep. 441, 28 L. ed. 64, Mr. Justice Miller said: "It was decided in the case of *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983, that contracts by attorneys for compensation in prosecuting claims against the United States were not void, because the amount of it was made contingent upon success, or upon the sum recovered. And the well-known difficulties and delays in obtaining payment of just claims which are not within the ordinary course of procedure of the auditing officers of the government justifies a liberal compensation in successful cases where none is to be received in case of failure. Any other rule would work much hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights." And in *Barber Asphalt Paving Co. v. Botsford*, 56 Kan. 532, 44 Pac. 3, where a paving company engaged agents to secure from the city council of Atchison contracts for street paving, and agreed to pay them a certain per cent of the money realized on the work to be done under such contracts as they might secure, it was held that no corrupt or improper influences having been used, the fact that the compensation was contingent did not render the contract invalid.

In *Denison v. Crawford Co.*, 48 Iowa, 211, an agent was employed to make application to the government for its swamp lands or indemnity therefor, and was to receive one-half of what he procured for his services. In order to effect the object of the contract, congressional action became necessary, which he aided in procuring by

legitimate means. Held, that the contract was not void as against public policy.

In Chippewa Valley etc. Ry. Co. v. Chicago etc. Ry. Co., 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601, a contract between two railroad companies was held to be void as against policy, when one of them, in consideration of a contingent compensation, among other things a part of the grant, agreed to refrain from applying to the legislature for a grant, and to assist the other in getting it by lawful means.

KINKEAD v. TURGEON.

[74 Neb. 580, 109 N. W. 744.]

COMMON LAW—Adoption of.—By statute so much of the common law as is applicable to our conditions and not inconsistent with the constitution of the United States, or of the state, is in force in Nebraska. (p. 742.)

RIPARIAN RIGHTS—Common-law Doctrine.—Under the common law the title to the bed of all fresh-water rivers, above the ebb and flow of the tide, whether navigable or non-navigable, where the river forms the boundary between adjoining owners, is in the riparian owner to the thread of the stream and this law is in force in Nebraska. (p. 743.)

RIPARIAN RIGHTS—Common-law Doctrine.—The common law with reference to riparian ownership in navigable streams is not inconsistent with the constitution of the United States, nor with the constitution and statutes of Nebraska, and hence the riparian owner takes title to the thread of the stream. (p. 745.)

RIPARIAN RIGHTS—Accretions.—The rights of riparian owners upon a navigable river to land formed by accretion are the same as if the river were not navigable, and the rules of the common law apply in full force. (p. 746.)

RIPARIAN RIGHTS—Title to Bed of Navigable Stream.—A riparian owner of lands on a navigable stream above the ebb and flow of the tide takes title to the thread of the stream, and if such river suddenly changes its channel and leaves its old bed, he still holds to the thread of the channel where the waters flowed. (p. 748.)

RIPARIAN RIGHTS—Title to Bed of Navigable Stream.—A riparian owner upon the bank of a navigable stream, though he takes title to the thread thereof, cannot exercise dominion over its waters or bed in any manner inconsistent with or opposed to the public easement of passage; but when by reason of natural changes the stream abandons its old bed and seeks a new one, the right of passage over the old bed is abandoned and such bed reverts to the riparian owner to the thread of the channel where the waters flowed. (p. 749.)

J. T. Spencer and R. E. Evans, for the plaintiff in error.

J. J. McAllister, E. J. Stason and J. C. McConkey, for the defendants in error.

⁵⁸⁰ LETTON, J. The facts in this case are set forth in a former opinion by Oldham, C., reported in 74 Neb. 573, 104 N. W. 1061. On account of the fact that at the former hearing the commission was not favored with an oral argument of the case, and, further, for the reason that the question involved is of great public importance, a rehearing was allowed, and the case is again presented for consideration. As was pointed out in the former opinion, the question presented is here for the first time, though cases involving the rights of riparian owners to lands formed by accretion as alluvium have heretofore been considered by the court, and in deciding some of these cases certain expressions of opinion have been incidentally made by the writers of the several opinions ⁵⁸¹ upon the question here presented. In none of them, however, was the determination of this question necessary to the disposition of the case, nor was any argument made or authorities presented upon the point. In *Clark v. Cambridge & A. I. & I. Co.*, 45 Neb. 798, 64 N. W. 239, the writer of the opinion indicates his personal views upon this question, but, since the case expressly holds that the Republican river is not a navigable stream, the expression was purely obiter. In *Crawford Co. v. Hathaway*, 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L. R. A. 889, opinion by Holcomb, J., the writer of the opinion says: "Whether the common-law rule fixing the rights of riparian proprietors applies to the larger streams of the state, such as may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, presents an entirely different question, and it would seem that riparian rights would not attach to the waters of such rivers. A final determination of the question, however, is not here made, as this should be left to be decided in a proper case, where the subject is fairly presented and considered after opportunity for thorough investigation, aided by the researches and arguments of counsel."

It will be seen, therefore, that we approach the question unhampered by any previous adjudication.

There is an irreconcilable conflict between the decisions of the courts of different states of this country upon this question. From a somewhat extended examination of the various opinions, the writer believes that much of the confusion has resulted, partly from a mistaken idea as to what the

supreme court of the United States had decided upon the question, partly from an idea that meander lines in maps of original surveys limited and bounded the estate of the riparian owner by the bank of the stream, and partly from a mistaken idea of the necessities of the case, based upon the differences in length, volume and navigability of the great rivers of America above tide water as compared with the inconsiderable extent of those English rivers which are navigable both above and below ⁵⁸² the flow of the tide: See *Mayor and Aldermen of the City of Mobile v. Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325; *McManus v. Carmichael*, 3 Iowa, 1, 56; *Cooley v. Golden*, 117 Mo. 33, 25 S. W. 100, 21 L. R. A. 300.

The statute of this state provides: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory is adopted and declared to be law within said territory": Comp. Stats. 1903, c. 15a, sec. 1; Annotated Stats. 6950. In this connection we have said: "The power of the courts to declare established doctrines of the common law inapplicable to this state should be used somewhat sparingly, and its exercise is not to be justified unless the inapplicability of a rule is general, extending to the whole or the greater part of the state, or, at least, to an area capable of definite judicial ascertainment. The common-law rules as to the rights and duties of riparian owners are in force in every part of the state, except as altered or modified by statutes": *Meng v. Coffee*, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L. R. A. 910; *Slattery v. Harley*, 58 Neb. 575, 79 N. W. 151.

The statutory provision above set forth has been in force in the territory and state of Nebraska for over fifty years, and during that period of more than half a century the courts have declared the common law inapplicable in but few instances, and in several of the instances that portion of the common law held inapplicable to our changed conditions has been that part thereof consisting of statutes enacted long before the American Revolution: *Meng v. Coffee*, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L. R. A. 910. The cases in which the applicability of the common law as to the rights of riparian owners has been challenged heretofore in this state have all been concerned with the subject of the

rights of the riparian owner to the unimpaired use of the water in the stream in resistance to a right claimed by appropriators to take it for purposes of irrigation or power; and the language used in *Meng v. Coffee*, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L. R. A. 910, and other cases dealing with the same subject, while declaring as a general rule the supremacy ⁵⁸³ of the common-law doctrine, is hardly applicable upon the question here presented, for, when deciding that the right of the riparian owner to the use of the running water in a stream was superior to the right of a person seeking to divert the water from the stream for irrigation purposes, it can hardly be said that the court had in mind the question here presented as to the right of a riparian owner to an abandoned river-bed of a navigable stream. We think the question, therefore, must be considered open and not settled by the prior decisions. They are worthy of consideration however, and must be given weight as determining the general policy of this court with reference to the question of the rejection of the common-law rule.

The questions, then, necessary for determination in this case are: 1. What is the common law of England as to the rights of riparian proprietors in such a case as this? And 2. Are the provisions of the common law applicable, and, if applicable, are they in any way inconsistent with the constitution of the United States, with the organic law of this state or with any law passed by the legislature of this state? These being the questions presented, it is obvious that the weight to be attached to the opinions of the courts of other states upon the question of the rights of riparian proprietors in an abandoned river-bed depends upon how far the constitution and statutes of such state correspond with those of this state, as well as upon the persuasiveness of the reasoning set forth in the opinions.

Under the common law of England the title to the bed of the sea below high-water mark, and to the bed of all rivers as far as the flow of the tide extended, was in the crown, but the title to the bed of all fresh-water rivers above the ebb and flow of the tide, whether navigable or non-navigable, where the river formed the boundary between adjoining proprietors, was in the riparian owner to the thread of the stream: Lord Hale, *De Jure Maris*, Hargrave Law Tracts, 5; *King v. Wharton*, 12 Mod. (Eng.) 510; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. ⁵⁸⁴ Rep. 808, 35 L. ed. 428;

Farnham on Waters, sec. 48; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, 38 L. ed. 331. Chancellor Kent says: "The right of sovereignty in public rivers above the flow of the tide is the same as in tide waters; they are *juris publici*, except that the proprietors adjoining such rivers own the soil, *ad filum aquae*. But grants of land, bounded on rivers, or upon margins of the same, or along the same, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum* as a public highway. The proprietors of the adjoining banks have a right to use the land and water of the river, as regards the public, in any way not inconsistent with the easement": 3 Kent's Commentaries, 13th ed., p. *427. This also is the rule of the civil law: Ware on Roman Water Law, secs. 22, 94. There appears, then, to be no controversy as to what constitutes the common law of England in regard to fresh waters or navigable rivers above the flow of the tide. Some of the cases in this country fail to draw a distinction between the rule of the common law with reference to rivers which are navigable in fact above the flow of the tide, and those navigable only where the tide flows, and adopted the idea that by the common law no rivers were navigable or considered as navigable in law except those in which the tide rose and fell. Comparing, then, the diminutive size and length and volume of the rivers of England with the magnificent waterways of this country, it was held that the common law as to navigable rivers was inapplicable to the situation in this country, and that our great rivers, which are navigable in fact for hundreds or perhaps thousands of miles, are to be treated in law as were navigable rivers of England, meaning thereby the rivers in which the flow of the tide was perceptible. Much reasoning has been indulged in, based upon the apparent disproportion of the rivers of England ⁵⁸⁵ and America, to show the necessity of abrogating the common-law rule on account of the actual navigability of our rivers above tide water. However, the rule of the common law has been adopted in Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, partly in

New York, and in Ohio, South Carolina and Wisconsin. It is rejected in Pennsylvania, Virginia, North Carolina, Alabama, Florida, Texas, Tennessee, Iowa, Kansas, Minnesota, Missouri, Oregon, Nevada and California. In some of the states which reject the rule the rejection is based upon the system of land surveys of the United States, it being held that, where in the original survey the boundary next the stream is meandered, the government has parted with its title only to the extent of the meander line, and has reserved to itself, or to the state which afterward was created, the title to the bed of the stream. Later decisions of the United States supreme court, however, have settled that the meander line along the bank of a navigable river is not a monument of title or boundary line, but merely marks the place where the water flowed at the time of the survey (*Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 35 L. ed. 428; *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518, 33 L. ed. 872), and the doctrine of that court now is that, by the admission of the several states, whatever right or title the United States had to the bed of such navigable streams passed to the state government, and that the local law of each state determines the question whether the bed of such streams belongs to the state or to the riparian owner: *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *St. Louis v. Myers*, 113 U. S. 566, 5 Sup. Ct. Rep. 640, 28 L. ed. 1131; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 35 L. ed. 428; *St. Anthony Falls Water-Power Co. v. Board of Water Commissioners*, 168 U. S. 349, 18 Sup. Ct. Rep. 157, 42 L. ed. 497. These decisions of the supreme court of the United States conclusively establish the fact, therefore, that the common law with reference to riparian ownership in navigable streams is not inconsistent with the constitution of the United States nor with the organic law of this state, and, since ⁵⁸⁶ no law upon this subject has been passed by the legislature of the territory of Nebraska or of the state of Nebraska, the common law is not inconsistent with the statutory law of the state.

The only remaining question, then, is whether or not the common-law rule is applicable to the conditions in this state with reference to the rights of riparian owners upon the Missouri river. As to a portion of such riparian rights this court has already spoken. We have held that the rights of riparian owners upon the Missouri river to land formed

by accretion are the same as if the river were not navigable, and that the common law applies in full force: *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104. The same doctrine has been declared by the supreme court of the United States in the case of *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518, 33 L. ed. 872, citing *Jones v. Soulard*, 24 How. (U. S.) 41, 16 Sup. Ct. Rep. 604, and other cases. In passing upon the applicability of the common law to our conditions, in the first place, it is well to observe that for upward of half a century the people of the territory of Nebraska and the state of Nebraska have been in occupancy of the west bank of the Missouri river. The first settlement of the territory was along the Missouri river, and its fertile valley has been the home of thrifty farmers ever since. It is a matter of public knowledge, of which the court will take judicial notice, that that great river in this locality takes its course through a wide valley composed, in the main, of loose, sandy and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous; that sometimes, during flood periods, its current will strike or impinge upon its banks at such an angle and with such effect as, even in a single day, to undermine the same, and cause large masses of soil to fall into the stream and be disintegrated, and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the ⁵⁸⁷ northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed, and left the former peninsula, with the abandoned bed, entirely across the river upon the eastern or northern bank, and thus physically dis severed from the state of Nebraska and conjoined to Dakota, Iowa or Missouri: See *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. Rep. 396, 36 L. ed. 186; *Missouri v. Nebraska*, 196 U. S. 23, 25 Sup. Ct. Rep. 155, 49 L. ed. 372. These processes have been going on for fifty years. During the whole period of time the state of Nebraska has existed it has never asserted any title or dominion over the abandoned river-bed, but has left the riparian owner in full possession and control of the same to the thread of the stream, and many fertile farms now occupy the place where the

waters once flowed. When the river abandoned the bed the riparian owner occupied it, claiming title thereto, and as fast as it became subject to useful purposes reclaimed it for agriculture. For so long a period, therefore, it has been considered by the authorities of the state of Nebraska that the common law is applicable to the conditions along the Missouri river, and the fact of this administrative construction of the law by the state authorities, extending over so many years, is entitled to great, if not controlling, weight upon this question. No evil consequences have been pointed out to us in the brief of defendant in error, which are liable to occur to the public welfare by the continuance of this policy, nor are we able to discern wherein there is any such change in conditions from those which have so long prevailed along this boundary, as would warrant the court in giving a new construction to the rights of riparian proprietors other than that which has been, at leastly tacitly, given by the public authorities for so long a time. Further, we see nothing in this doctrine which in anywise impairs or interferes with the public right of navigation over these waters. It is true that, while the Missouri river has been declared by Congress to be a navigable stream, and while for many years during the early history of the great Northwest its ⁵⁸⁸ waters furnished almost the only channel of communication between the settled portions of the United States and the vast territory lying along its course and around its headwaters, still in later years, while intermittent attempts have been made to re-establish the river as a highway of commerce, the difficulties and disadvantages caused by its rapid current, its variable, erratic and inconstant course, and the crumbling nature of the soil upon its banks, have been so great that commerce has abandoned its waters and betaken itself to the more reliable, though perhaps more expensive, method of transportation by rail. Theoretically, therefore, the Missouri river is a navigable stream along the Nebraska boundary. Practically, at the present time, its usefulness as a public waterway has departed. However, in the consideration of this case we have treated it as if it were practically navigable, because, while improbable, it is not impossible that at some time in the future, under changed conditions, these waters may again become a channel of communication and intercourse.

We have seen that the common-law rights of riparian owners as to accretions along the bank of this river is in force in this state; and it is a fact within the personal observation of the writer of this opinion that at some points on the boundary of this state, by virtue of the rapid accretions which sometimes take place along this stream, the present channel of the river is removed to a distance of more than a mile from where it was thirty years ago. If no injury is done to the public right by reason of the rapid and numerous changes of the channel of the Missouri river by the action of accretion, by the growth of sand bars and islands, and the gradual filling up of the intervening space between them and the bank, by which changes the bed where the river actually flowed is even more fully and effectually abandoned than where, by a sudden change, the river has left its bed and sought a new one, how can the public be in anywise injured by the latter form of abandonment? The effect is the same in both cases. Along the Missouri river the change of the ⁵⁸⁰ bed to dry land in the case of accretion is sometimes even more rapidly performed than the changes of the abandoned bed to dry land in the case of avulsion, for in such case the abandoned bed is usually full of water, which gradually evaporates, and which in many instances forms lakes which stand for years, occasionally filled again by the river in flood periods, a number of these "cut-off lakes," as they are locally termed, extending from three to eight or ten miles long and occupying practically the whole of the abandoned bed for many years.

The fact that the rights of riparian owners are preserved *ad filum aquae* is not inconsistent with, and does not interfere with, the right of navigation. The public retains its easement of the right of passage along and over the waters of the river as a public highway. This is the interest of the public in connection with such rivers which is paramount, and which is and should be protected by the courts. If, however, the river ceases to be navigable at any particular point, where by the gradual filling up of its old bed, or a part of it, by the process of accretion, or by a sudden change of its bed by the carving out of a new channel, the public right attaches to the waters of the new channel to the same extent as it did while it flowed in the former bed. The public, then, has lost nothing by the change of channel. All its rights have been retained. As was said long ago by Ul-

pian: "In like manner if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in a public river, as the bed belongs to the neighbors on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly the bed ceases to be public. Also the new channel which the river has made, although it was private, begins, nevertheless, to be public, because it is impossible that the channel of a public river should not be public": Ware on Roman Water Law, sec. 22. To hold otherwise in case of a stream of the characteristics of the Missouri river might well lead, by way of repeated changes of the ⁵⁹⁰ river's channel, to additions to the public domain at the expense of adjoining proprietors. For example, if in this case we should hold that the bed of the abandoned stream belonged to the state of Nebraska, by the same reasoning the bed of the new channel belongs to the state, and if the river should again change its channel near by, by another avulsion, thus leaving the new bed dry, the state then would be the owner of the land in two abandoned river beds and also of the bed of the new channel. The property in the second and third bed then would be wrested without compensation from the property of private individuals. A doctrine which might work such an injustice as this ought never to be adopted by a court if any other view is reasonable. The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it has over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with or opposed to the public easement. When the public entirely abandons a public road either by virtue of nonuser or by its vacation through proper proceedings, it does not retain the title to the land over which the easement of travel existed, but it reverts to the adjoining owners to the middle of the road. And so with a navigable river of this class, when by reason of natural changes the stream abandons the bed over which, through the instrumentality of its waters, the public has the right to pass, the right of passage is as effectually abandoned at that point as when a

road is vacated and a new one opened to take its place. The right of the public is to travel in the new road, and its right and privilege to pass over the old one revert to the abutting owners; and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which ⁵⁹¹ alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed. For these reasons, we are satisfied that the common law as to the rights of riparian owners to the abandoned channel of a navigable fresh-water stream is applicable in Nebraska, and not inconsistent with our laws or constitution, and that therefore the plaintiff is the owner of the property in controversy in this action.

We have not deemed it necessary to cite or particularize more than a few of the large number of cases bearing upon the proposition hereinbefore discussed. They may be found collated and distinguished in *Farnham on Waters*; *Gould on Waters*; note to 23 *English Ruling Cases*, 158; *American and English Encyclopedia of Law*, second edition, as well as in other standard works of reference. In several instances the courts of a state lying upon the one side of one of our great rivers hold and enforce the rule of the common law, and on the other side of the same river the courts of a sister state declare that the riparian owner only takes to high-water or low-water mark, as the case may be. On the whole matter, we deem it best to let well enough alone, and adhere to the custom and policy of this state since its earliest settlement. The former opinion in this case is set aside, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

A Riparian Owner does not Own to the Middle or thread of a navigable stream, according to some authorities, but only to low-water mark: Frank v. Goddin, 193 Mo. 390, 112 Am. St. Rep. 493. See, also, Mobile Trans. Co. v. Mobile, 128 Ala. 335, 86 Am. St. Rep. 143; Freeland v. Pennsylvania R. R. Co., 197 Pa. 529, 80 Am. St. Rep. 850. In New Jersey riparian owners on a navigable stream above the point where the tide ebbs and flows have title to the bed of the stream to the middle thereof, subject only to the right of the state to regulate navigation: Grey v. Mayor etc., 60 N. J. Eq. 385, 83 Am. St. Rep. 642.

If a Change in the Position of a Navigable River dividing the territory of two states is by gradual and imperceptible encroachment, or insensible recession, so that the process cannot be detected, the boundary follows the shifting thread of the stream; but if from a

flood and ice gorge, or other violent natural cause, there is a sudden, visible irruption of the water, whereby the land upon one side is degraded or submerged, or a new channel is cut for the stream, the boundary remains stationary at its former location, and the boundaries of the riparian owner whose lands have been affected remain unchanged: *Fowler v. Ward*, 73 Kan. 511, 117 Am. St. Rep. 534, and see the cases cited in the cross-reference note thereto.

BLACKER v. STATE.

[74 Neb. 671, 105 N. W. 302.]

CRIMINAL LAW—Confessions as Evidence.—One cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof aliunde of the essential facts constituting the crime. (p. 753.)

W. S. Hedrick and W. C. Brown, for the plaintiff in error.

N. Brown, attorney general, and W. T. Thompson, for the defendant in error.

672 **HOLCOMB, C. J.** The defendant (plaintiff in error) was charged and convicted of the crime of uttering a false, fraudulent and forged instrument. The forged instrument alleged to have been uttered by the accused was a warranty deed, purporting to convey title to certain lands situated in Keya Paha county. The verdict of guilty rests almost entirely, if not exclusively, on an alleged written confession of the accused while under arrest and waiting trial for the crime charged. The writing was sworn to by the accused, and was a narration of purported facts as to how the accused and others perpetrated the forgery of the deed, the uttering of which was charged in the information. The court instructed the jury: If you believe from the evidence beyond a reasonable doubt that the crime of uttering a forged deed was committed as charged, "and you further believe from the evidence beyond a reasonable doubt that the defendant made the confession given in evidence in this case, you should treat and consider such confession precisely as you would any other evidence or testimony; and if the jury believe said confession to be true, then you should act on it accordingly. The confession offered in evidence is compe-

tent evidence for you to consider in determining the guilt or innocence of the defendant in this case." No other instruction regarding the alleged confession was given, nor were any requested by counsel for the accused. That the accused signed and made oath to the written confession is established beyond peradventure of doubt, and there is nothing in the record to discredit its truthfulness. There was, however, a very serious controversy concerning the manner in which the confession was procured, and whether it was freely and voluntarily made, and there was introduced more or less testimony of a conflicting character on that point. It was the theory of the defense, to support which there is competent evidence in the record, that the affidavit termed a confession was procured to be made for the purpose of securing the extradition ⁶⁷³ of an alleged accomplice in the forgery of the deed, with the view of having the prosecuting witness compensated for the financial loss he had sustained because of the void deed which he had obtained from the accused, and the dismissal of the prosecution. There is evidence tending to prove that it was represented to the accused that, by making the affidavit, requisition papers could be procured for the alleged accomplice, and he would, before being brought to this state to answer to the crime charged, make good the financial loss sustained by the prosecuting witness, and that, thereupon, the prosecution of the crime charged would be terminated, and the accused thus regain his liberty. Whether the question of the confession being the free and voluntary act of the accused, which was a mooted one, should not have been submitted to the jury, under suitable instructions, as a question of fact, we need not here determine, since it is not raised by the record. What has been said regarding this phase of the case is for the purpose of more clearly presenting the error relied on for a reversal of the judgment of conviction.

It is earnestly contended in briefs of counsel for defendant that there is no evidence of the corpus delicti aside from the alleged confession, and that the confession alone is insufficient to support the verdict of guilty found by the jury. It seems to be a well-settled rule in almost if not all the states of the Union that an extrajudicial confession will not be received as conclusive plenary evidence, and that there must be also proof of the corpus delicti: 1 Elliott on Evidence, sec. 292, and other authorities cited. This court has

recently said that "one cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof aliunde of the essential facts constituting the crime." It is also said that, "while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, ⁶⁷⁴ with slight corroborative circumstances, be sufficient to warrant a conviction": *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721. See, also, *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Priest v. State*, 10 Neb. 393, 6 N. W. 468; *Dodge v. People*, 4 Neb. 220.

It is modestly contended by the state that there is found in the record, in addition to the confession, slight corroborating circumstances of the commission of the crime charged, and sufficient to bring the case within the rule announced in *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721, and to support the judgment of conviction. A careful perusal of the evidence contained in the bill of exceptions has failed to satisfy us that there is any competent evidence of the essential elements of the crime charged, aside from the written confession. It is true there is some evidence to prove that the deed was inadequate to convey title to the grantee, the prosecuting witness, but this does not prove, nor tend to prove, that the instrument delivered to him by the defendant was a forgery. We fail to find anything in the testimony given by the prosecuting witness to prove his title failed because the deed of conveyance, which the accused was charged with uttering, was a forgery. He says he lost the land because of a forged title. The record in a civil action, in which the question of title, and the force and effect of the deed alleged to have been forged, and regarding which the accused was charged with uttering, were involved, was introduced without objection as evidence in the case, but subsequent to its introduction, on the objection and motion of counsel for the accused, this item of the evidence was all stricken out for all purposes, except as evidence that the prosecuting witness had been divested of his title to the land. This, of course, left nothing in the way of evidence, from which it might be inferred that the deed was a forged instrument, or that the loss of title was the result of a forged

deed, with the uttering of which the defendant was charged in the information on which he was being prosecuted. We can find nowhere evidence independent of the written confession from which the deduction is at all warrantable that the deed he was ⁶⁷⁵ charged with feloniously uttering was in fact a forged instrument. There is on this point an utter failure of proof, the confession alone excepted; hence we are driven to the conclusion that the evidence is insufficient to sustain a conviction, and that the judgment complained of must be reversed and the cause remanded for a new trial, which is accordingly ordered.

Extrajudicial Confessions of Guilt, without corroborative proof of the corpus delicti, are insufficient to sustain a conviction: See the note to *Daniels v. State*, 6 Am. St. Rep. 251; *Harris v. State*, 28 Tex. App. 308, 19 Am. St. Rep. 837; *Willard v. State*, 27 Tex. App. 386, 11 Am. St. Rep. 197.

HALTER v. STATE.

[74 Neb. 757, 105 N. W. 298.]

CONSTITUTIONAL LAW—Use of United States Flag.—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for advertising purposes is valid, and not unconstitutional as abridging the privileges or immunities of the citizen, nor as depriving any person of life, liberty or property without due process of law. (p. 756.)

UNITED STATES FLAG—Power to Prohibit Use of.—The power to prohibit the use of the United States flag does not belong exclusively to the national government, but may be exercised by a state. (p. 757.)

CONSTITUTIONAL LAW—Use of United States Flag—Class Legislation.—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for advertising purposes is valid and not unconstitutional as special or class legislation. (p. 757.)

CONSTITUTIONAL LAW—Police Power.—The state, in the exercise of its police power, has the right to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but such laws must be in fact calculated to promote those objects; otherwise they are an arbitrary restraint on the citizen, and unconstitutional. (p. 758.)

CONSTITUTIONAL LAW—Police Power.—A state has the undoubted right, in the exercise of its police power, to legislate in the interest of the public peace, by preventing an improper use of the flag of the United States. (p. 759.)

CONSTITUTIONAL LAW—Use of United States Flag for Advertising Purposes.—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for adver-

tising purposes, is not unconstitutional as operating to deprive those engaged in traffic in intoxicating liquors of their property, advertised by means of such flag, without due process of law. (pp. 759, 760.)

POLICE POWER—Patents and Trademarks.—A patent or trademark puts no restraint upon a state in the exercise of its police power, beyond the restraint imposed with respect to property generally. (p. 760.)

Cooper & Dunn and S. R. Rush, for the plaintiffs in error.

F. N. Prout, attorney general, and N. Brown, for the defendant in error.

⁷⁵⁷ ALBERT, C. The defendant was convicted of a violation of the statute entitled "An act to prevent and punish the desecration of the flag of the United States": Laws 1903, c. 139.

It is conclusively established that the defendants were ⁷⁵⁸ engaged in selling intoxicating liquors at retail, and sold and offered for sale beer contained in bottles, to which was attached a label on which there was printed a representation of the flag of the United States, and that such label was so used to advertise the beer and distinguish it from other products of a like nature. It is admitted that the beer was sold to the defendants by a brewing company in the bottles thus labeled, and that the representation of the flag thereon is a part of the registered trademark of the brewing company. It is now claimed that the statute under which the defendants were convicted is unconstitutional, and consequently that the judgment of conviction must be reversed. The statute is as follows:

"Section 1. Any person who in any manner, for exhibition or display, shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise upon which shall have been printed, painted, attached, or otherwise placed, a

representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment ⁷⁵⁹ for not more than thirty days, or both, in the discretion of the court.

"Sec. 2. The words, flag, color, ensign, as used in this act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, standard, or ensign of the United States of America.

"Sec. 3. This act shall not apply to any act permitted by the statutes of the United States of America or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed, said flag, disconnected from any advertisement."

The defendants take the position that the act contravenes section 1 of the fourteenth amendment to the federal constitution, which prohibits the states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of life, liberty or property without due process of law, and the provisions of the state constitution against special or class legislation. This position is supported by two cases: *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41, 49 L. R. A. 181, and *People v. Van De Carr*, 178 N. Y. 425, 102 Am. St. Rep. 516, 70 N. E. 965, 66 L. R. A. 189. In each of these cases a statute substantially like the one under consideration was held unconstitutional. The Illinois case rests on three propositions, which for convenience we

shall consider out of the order in which they are there discussed.

⁷⁶⁰ As to the first, namely, that the act was unconstitutional, "as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted to him by the federal constitution," little need be said. The right to advertise whisky, beer, tobacco and other articles of merchandise by the use of the national flag is certainly not the subject of an express constitutional grant, and it can be said to be impliedly granted only in the sense that, like an infinite number of other acts, it is not prohibited. If the fact that an act or course of action is not prohibited by the federal constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our criminal code is largely waste paper. A moment's reflection would seem sufficient to show that the proposition is utterly unsound. Nor can we agree with counsel that the federal government has the exclusive power to regulate the use of the national flag. It is not infrequent that the same act is an offense against both the state and federal governments. Counterfeiting furnishes an apt illustration. The power "to provide for the punishment of counterfeiting the securities and current coin of the United States" is expressly given to Congress, but the offense is also punishable under the laws of the several states, the validity of which was upheld in *Fox v. Ohio*, 5 How. (U. S.) 410, 12 L. ed. 213.

The second proposition to be noticed is that "the act is also unduly discriminating and partial in its character." This proposition is based on the exceptions to the general provisions of the act. The exceptions enumerated in the Illinois act are fewer than in our own, but we do not think it can fairly be said that in either case they render the act unduly discriminating or partial. Neither act is aimed against any individual or class of individuals, but against certain acts. If it were competent for the legislature to deal with the subject, it was clearly competent for it to define the crime of desecration, and to specify ⁷⁶¹ the acts constituting the offense. Every use of the flag not included in such definition or specification would be impliedly excepted from the operation of the act, and it would seem wholly immaterial that the legislature saw fit to make some acts the subject of

an express exception, instead of narrowing the definition of the crime, or the specification of the acts constituting it, in such a way as to exclude the acts included in such exception. Besides, there is nothing in the state or federal constitution which forbids the classification of subjects for legislation, so long as the classification is not arbitrary: *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313, and cases cited. There this court held that the statute providing for the taxing of an attorney's fee against a defeated insurance company was valid legislation: See, also, *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922; *State v. Montgomery*, 92 Me. 433, 43 Atl. 13; *Ex parte Thornton*, 4 Hughes, 220, 12 Fed. 538; *Davis v. State*, 51 Neb. 301, 70 N. W. 984. In this instance, the classification does not appear to be an arbitrary, but a most natural one. It is a matter of common knowledge that the use of the flag for advertising purposes offends the sensibilities of a large portion of our people. The statute is directed against the use of the flag for that purpose, but excepts from its provisions certain uses to which the most sensitive could not object. Without such exception, either express or implied, the statute would be oppressive, if not absurd.

We come now to the remaining proposition on which the Illinois case rests, namely, that the statute is an infringement upon the personal liberty guaranteed by the state and federal constitutions. The court in that case recognizes the right of the state, in the exercise of its police power, to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but holds that such laws must be in fact calculated to promote those objects, or some of them; otherwise, they are an arbitrary restraint on the citizen and unconstitutional. Such is the generally ⁷⁶² accepted doctrine. *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, contains a discussion of the police power of the states, and an examination of many cases bearing on the subject. After a somewhat lengthy discussion of the doctrine just referred to, the court, in *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41, 49 L. R. A. 181, held that the statute was not calculated to promote any of the objects just enumerated, and was therefore unconstitutional and void. Again, we find ourselves unable to agree with a court to whose opin-

ions, ordinarily, we attach great weight. Patriotism has ever been regarded as the highest civic virtue, and whatever tends to foster that virtue certainly makes for the common good. That familiarity breeds contempt has the force of a maxim. That contempt or disrespect for an emblem begets a like state of mind toward that for which it stands is a psychological law which underlies the canons against profanation which abound in every system of religious instruction. Such inhibitions against the irreverent use of sacred things are not mere arbitrary fulminations, but are grounded on sound practical considerations and the conviction that such use of the sacred emblems of religion is inimical to the cause of religion itself. The legislation under consideration may be justified on the same principle. The flag is the emblem of national authority. To the citizen it is an object of patriotic adoration, emblematic of all for which his country stands—her institutions, her achievements, her long roster of heroic dead, the story of her past, the promise of her future; and it is not fitting that it should become associated in his mind with anything less exalted, nor that it should be put to any mean or ignoble use.

Moreover, that the citizen resents any improper use of the flag of his country, and that his resentment is frequently carried to the extent of a breach of the peace, are matters of common knowledge. The state has the undoubted right to legislate in the interest of the public peace. As was said in *Updegraph v. Commonwealth*, 11 Serg. & R. (Pa.) 394: 763 “An offense against the public peace may consist either of an actual breach of the peace, or doing that which tends to provoke and excite others to do it. Within the latter description fall all acts and all attempts to produce disorder, by written, printed, or oral communications, for the purpose of generally weakening those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual.”

The doctrine announced in that case seems peculiarly applicable to the case in hand, and to justify the act in question as a valid exercise of the police power of the state. In *People v. Van De Carr*, 178 N. Y. 425, 102 Am. St. Rep. 516, 70 N. E. 965, 66 L. R. A. 189, the act was not held wholly void, but only in so far as it applies to articles manufactured and in existence when the act went into effect. To that extent it was held unconstitutional as in contravention of the constitu-

tional provision that no person shall be deprived of life, liberty or property without due process of law. If the statute is vulnerable to that objection, it would seem that a large number of our penal statutes, commonly regarded as valid, must fall by the same rule. When our act against taking fish with a seine went into effect, there were doubtless many seines manufactured and in existence. The same may be said of swivel-guns, when the act making it unlawful to kill certain wild water-fowl with such guns became a law. But to our knowledge it has never been seriously claimed that either of such acts is unconstitutional and void to the extent that it applies to "articles manufactured and in existence when the act went into effect." By sweeping prohibitory legislation, those engaged in the manufacture and sale of intoxicating liquors were put out of business in the state of Kansas, and property whose chief value consisted in its use in connection with the manufacture and sale of such liquors was rendered practically valueless. The validity of this legislation was assailed on the ground that it operated to deprive those engaged in the traffic in intoxicating liquors of their property without due process of law: *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205. Considering that feature of the case, the court said: ⁷⁶⁴ "Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments."

Nor does the fact that the flag was a part of the trademark of the brewing company place the defendants in any more favorable position. To the extent that the trademark is property, it comes within what has already been said. A patent or trademark puts no restraint upon the state in the exercise of its police power beyond the restraint imposed with respect to property generally: *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

We have gone over the act in the light of excellent briefs on either side and have reached the conclusion that it is not only a valid piece of legislation, but one well calculated to promote the common weal.

It is therefore recommended that the judgment of the district court be affirmed.

Duffie and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Decision in the Principal Case was affirmed in the supreme court of the United States (Halter v. State, 205 U. S. 34, 27 Sup. Ct. Rep. 419, 51 L. ed. 696), Mr. Justice Harlan delivering the opinion of the court therein as follows:

“This case involves the validity, under the constitution of the United States, of an act of the state of Nebraska, approved April 8, 1903, entitled ‘An Act to Prevent and Punish the Desecration of the Flag of the United States.’†

†“ ‘§ 2375g. Any person who, in any manner, for exhibition or display, shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding \$100, or by imprisonment for not more than thirty days, or both, in the discretion of the court.

“ ‘§ 2375h. The words flag, color, ensign, as used in this act, shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color, or ensign, of the United States of America, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, color, standard, or ensign of the United States of America.

“ ‘§ 2375i. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed, said flag, disconnected from any advertisement’: 1 Cobbey’s Annotated Statutes (Neb.), 1903. c. 139.

“The act, among other things, makes it a misdemeanor, punishable by fine or imprisonment, or both, for anyone to sell, expose for sale, or have in possession for sale, any article of merchandise upon which shall have been printed or placed, for purposes of advertisement, a representation of the flag of the United States. It expressly excepted, however, from its operation any newspaper, periodical, book, etc., on which should be printed, painted, or placed a representation of the flag ‘disconnected from any advertisement’: 1 Cobbey’s Annotated Statutes (Neb.), 1903, c. 139.

“The plaintiffs in error were proceeded against by criminal information upon the charge of having, in violation of the statute, unlawfully exposed to public view, sold, exposed for sale, and had in their possession for sale, a bottle of beer upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States.

“The defendants pleaded not guilty, and at the trial insisted that the statute in question was null and void, as infringing their personal liberty guaranteed by the fourteenth amendment of the constitution of the United States, and depriving them, as citizens of the United States, of the right of exercising a privilege impliedly, if not expressly, guaranteed by the federal constitution; also, that the statute was invalid in that it permitted the use of the flag by publishers, newspapers, books, periodicals, etc., under certain circumstances, thus, it was alleged, discriminating in favor of one class and against others. These contentions were overruled, and the defendants, having been found guilty by a jury, were severally adjudged to pay a fine of fifty dollars and the costs of the prosecution. Upon writ of error the judgments were affirmed by the supreme court of Nebraska, and the case has been brought here upon the ground that the final order in that court deprived the defendants, respectively, of rights specially set up and claimed under the constitution of the United States.

“It may be well at the outset to say that Congress has established no regulation as to the use of the flag, except that in the act approved February 20, 1905, authorizing the registration of trademarks in commerce with foreign nations and among the states, it was provided that no mark shall be refused as a trademark on account of its nature ‘unless such mark . . . consists of or comprises the flag or coat-of-arms or other insignia of the United States, or any simulation thereof, or of any state or municipality, or of any foreign nation’: 33 Stats. at Large, 724, sec. 5, c. 592; U. S. Comp. Stats. Supp. 1905, p. 670.

“The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the

states of the Union have enacted statutes[†] substantially similar, in their general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the constitution of the United States. Our attention is called to two cases in which the constitutionality of such an enactment has been denied—*Ruhrstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41, 49 L. R. A. 181; *People ex rel. McPike v. Van De Carr*, 178 N. Y. 425, 102 Am. St. Rep. 516, 70 N. E. 965, 66 L. R. A. 189. In the Illinois case the statute was held to be unconstitutional as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted by the federal constitution, as unduly discriminating and partial in its character, and as infringing the personal liberty guaranteed by the state and federal constitutions. In the other case, decided by the court of appeals of New York, the statute, in its application to articles manufactured and in existence when it went into operation, was held to be in violation of the federal constitution, as depriving the owner of property without due process of law, and as taking private property for public use without just compensation.

“In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals, and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people.

“Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertisement, infringes any right protected by the constitution of the United States, or that it relates to a

[†]“Ariz., Rev. Stats. 1901, p. 1295; Colo., 3 Mills' Ann. Stats., Rev. Supp. 1891-1905, p. 542; Conn., Gen. Stats. 1902, p. 387; Cal. Stats. 1899, p. 46; Del., 22 Sess. Laws, p. 982; Hawaii, Sess. Laws 1905, p. 20; Idaho, Sess. Laws 1905, p. 328; Ill., Sess. Laws 1899, p. 234; Ind., Acts 1901, p. 351; Kan., Gen. Stats. 1905, sec. 2442, p. 499; Me., Rev. Stats. 1903, p. 911; Md., Laws 1902, p. 720; Mass., 2 Rev. Laws 1902, p. 1742; Mich., Pub. Acts 1901, p. 139; Minn., Rev. Laws 1905, sec. 5180; Mo., 2 Ann. Stat. 1906, sec. 2352; Mont., Laws 1905, p. 143; N. H., Pub. Stats. 1901, p. 810; N. J., Laws 1904, p. 34; N. Mex., Laws 1903, p. 121; N. Y., Laws 1905, vol. 1, p. 973; N. Dak., Laws 1901, p. 103; Ohio, Laws 1902, p. 305; Or., Gen. Laws 1901, p. 286; R. I., Sess. Acts Jan. & Dec. 1902, p. 65; Utah, Laws 1903, p. 29; Vt., Laws 1898, p. 93; Wis., Laws 1901, p. 173; Wyo., Laws 1905, p. 86.

subject exclusively committed to the national government. From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not, then, remarkable that the American people, acting through the legislative branch of the government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the nation. Indeed, it would have been extraordinary if the government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation, but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

“It may be said that, as the flag is an emblem of national sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that, in the absence of national legislation, the state is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the general government, but over which, in the absence of national legislation, the state may exert some control in the interest of its own people. For instance, it is well established that, in the absence of legislation by Congress, a state may, by different methods, improve and protect the navigation of a water way of the United States, wholly within the boundary of such state. So, a state may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism toward the nation, it necessarily encourages a like feeling toward the state. One who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown toward it. By the statute in question the state has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic—a purpose wholly foreign to that for which it was provided by the nation. Such a use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor.

And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that anyone has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation—which, in itself, cannot belong, as property, to an individual—has been placed on such thing in violation of law, and subject to the power of government to prohibit its use for purposes of advertisement.

“Looking, then, at the provision relating to the placing of representations of the flag upon articles of merchandise for purposes of advertising, we are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the nation’s power—the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the state erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each state in every legal way to encourage its people to love the Union with which the state is indissolubly connected.

“Another contention of the defendants is that the statute is unconstitutional in that, while applying to representations of the flag placed upon articles of merchandise for purposes of advertisement, it does not apply to a newspaper, periodical, book, pamphlet, etc., on any of which shall be printed, painted, or placed, the representation of the flag, disconnected from any advertisement. These exceptions, it is insisted, make an arbitrary classification of persons, which, in legal effect, denies to one class the equal protection of the laws.

“It is well settled that, when prescribing a rule of conduct for persons or corporations, a state may, consistently with the fourteenth amendment, make a classification among its people based ‘upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection’: *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666. In *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92, there was a difference of opinion in the court as to what was necessary to be decided, but

all agreed that a state enactment regulating the charges of a certain stockyards company, and which exempted other like companies from its operation, was a denial of the equal protection of the laws, and forbidden by the fourteenth amendment. In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679, the question arose as to the validity, under the equality clause of the constitution, of a statute of Illinois, forbidding, under penalty, the existence of combinations of capital, skill, or acts for certain specified purposes, but exempting from its operation agricultural products or livestock while in the hands of the producer. By reason of this exemption, the statute was adjudged to operate as a denial of the equal protection of the laws, and was, therefore, void. The court observed that such a statute was not a legitimate exertion of the power of classification, rested upon no reasonable basis, was purely arbitrary and therefore denied the equal protection of the laws to those against whom it discriminated. It said: 'We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.'

'The present case is distinguishable from the *Connolly* case (184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679). The classification there involved was of persons alike engaged in domestic trade, which trade, the court said, was, of right, 'open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe.' Now, no one can be said to have the right, secured by the constitution, to use the country's flag merely for purposes of advertising articles of merchandise. If everyone was entitled of right to use it for such purposes, then, perhaps, the state could not discriminate among those who so used it. It was for the state of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use—taking care, in such legislation, not to make undue discrimination against a part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be 'disconnected from any advertisement.' All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement, and be used upon a newspaper, periodical, book, etc., in such way as not to arouse a feeling of indignation nor offend the sentiments and feelings of those who

reverence it. In any event, the classification made by the state cannot be regarded as unreasonable or arbitrary, or as bringing the statute under condemnation as denying the equal protection of the laws.

“It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that, and, in addition, adjudge that it violates rights secured by the constitution of the United States. We cannot so say and cannot so adjudge.

“Without further discussion, we hold that the provision against the use of representations of the flag for advertising articles of merchandise is not repugnant to the constitution of the United States. It follows that the judgment of the state court must be affirmed.

“It is so ordered.

“Mr. Justice Peckham dissented.”

The Constitutionality of Statutes forbidding the use of the United States flag, or a likeness of it, for advertising or commercial purposes, is considered in *Ruhrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30; *People v. Van de Carr*, 178 N. Y. 425, 102 Am. St. Rep. 516.

FALL v. FALL.

[75 Neb. 120, 113 N. W. 175.]

JUDGMENTS—Jurisdiction—Conveyance of Lands in Another State.—A court of chancery, in a proper case, has power to compel a conveyance of lands situated in another country or state, where such court has jurisdiction of the parties interested. (p. 772.)

EQUITY JURISDICTION.—If a court of equity has, by its decree, ordered and directed persons properly within its jurisdiction to do, or refrain from doing, a certain act, it may compel obedience to this decree by appropriate proceedings, and any action taken by reason of such compulsion is valid and effectual wherever it may be assailed. (p. 774.)

JUDGMENTS of Other States—Effect on Title to Realty.—A decree of chancery, with respect to realty beyond its jurisdiction, can have no direct operation upon the property, and per se can in no way affect the legal or equitable title thereto. (p. 775.)

JUDGMENTS of Other States—Effect on Title to Realty.—A decree of a court of chancery in another state acting upon a person within its jurisdiction and directing him to make a conveyance of lands in nowise affects the title to the land. The decree and order act only upon the person, and, if obedience to its mandate is refused, it can only be enforced by the usual weapons of a court of chancery. (p. 778.)

CONFLICT OF LAWS—Transfer of Title.—The transfer of title to real estate within the limits of a state is entirely subject to

the laws of that state, and no interference with it can be permitted by other states. (p. 778.)

DIVORCE—Jurisdiction—Division of Real Estate.—Courts have no power or jurisdiction in a divorce proceeding to divide or apportion the real estate of the parties, unless given such power by statute, and if they attempt to act in excess of the powers therein granted, their action is void and subject to collateral attack. (p. 779.)

JUDGMENTS of Other States—Faith and Credit.—The clause of the national constitution providing that the courts of one state shall give full faith and credit to the judgments and decrees of the courts of a sister state does not require the courts of one state to give such judgments more force or greater effect than they would have had if rendered by the courts of that state, upon the same cause of action. (pp. 779, 780.)

Hainer & Smith, for the appellants.

T. H. Matters and Stark & Grosvenor, for the appellee.

121 LETTON, J. This is an action to quiet the title to an undivided one-half interest in a certain tract of land in Hamilton county, and to cancel and annul a certain mortgage and deed executed by the defendant, E. W. Fall, to the defendants, W. H. Fall and Elizabeth Eastin. The plaintiff, Sarah S. Fall, bases her right to the relief prayed upon a decree rendered in divorce proceedings in the state of Washington, whereby a court of that state set apart the premises to her as her separate property and ordered her former husband, E. W. Fall, to convey the same to her.

In 1876 E. W. Fall and Sarah Fall were married in Indiana. They afterward removed to Hamilton county, Nebraska, and lived in Nebraska until 1889, when they removed to the state of Washington. In 1879, while they lived in Nebraska, E. W. Fall purchased one hundred and sixty acres of land in Hamilton county, the title to the undivided one-half of which is in controversy. In 1887 he conveyed the farm to Mrs. Fall's brother, as an intermediary, who in turn reconveyed to E. W. Fall and Sarah S. Fall, thereby vesting each with an undivided one-half interest in the land.

E. W. Fall began an action for divorce against his wife in February, 1895, in the superior court of King county, **122** Washington, to which she filed an answer and cross-petition. The law of Washington required parties desiring a divorce to bring into court a list and description of all their property, and empowers the judge of the court, sitting as a chancellor, to make an equitable division of all the property between the parties: See former opinion, 75 Neb. 104, 113 N. W. 175.

The husband in his petition claimed the Nebraska land as his own property, while the wife asserted the same to be community property belonging to them both, and asked the court to set it apart to her as her separate property. On October 5, 1895, by its decree, the Washington court refused a divorce to the husband, and granted it to the wife on her cross-petition, and set apart and gave the Nebraska land to the wife as her sole and separate property, and directed the husband to convey the land to the wife in five days, which he refused and neglected to do. An appeal bond was filed, and the cause was taken to the supreme court of Washington by Mr. Fall, but on May 15, 1896, the appeal was dismissed. On May 24, 1895, E. W. Fall executed an indemnity mortgage to his brother, the defendant W. H. Fall, a resident of Nebraska, as defendants allege, to secure him from loss by reason of his having signed a note of one thousand dollars as surety for E. W. Fall in September, 1893, for money borrowed from his sister, Elizabeth Eastin. This mortgage was recorded on January 10, 1896. On July 3, 1896, without notice to E. W. Fall, the Washington court appointed one W. T. Scott as commissioner for the purpose, who executed a deed of E. W. Fall's undivided half interest in the Hamilton county land to Sarah S. Fall. This instrument was approved by the judge of the superior court, filed in the office of its clerk, and afterward recorded in Hamilton county, Nebraska. At the time of these various conveyances the land was in the actual possession of a tenant of E. W. Fall and Sarah S. Fall, but this tenant attorned to Sarah S. Fall, who has held possession ever since. On April 27, 1896, and while the appeal was pending, E. W. Fall, who in the meantime had become a resident of California, ¹²³ executed a warranty deed to Mrs. Eastin for his undivided one-half interest in the land in payment of the same debt. At the time of the divorce and conveyances the land was encumbered, and Fall's interest was apparently worth no more than the amount of the debt.

In 1897 Sarah S. Fall began this action in the district court for Hamilton county, Nebraska, setting up the proceedings and decree in the state of Washington, the execution of the deed to her by Scott, commissioner, the execution and recording of the mortgage to W. H. Fall and the deed to Mrs. Eastin, and alleging that the mortgage and deed were each made without consideration and for the pur-

pose of defrauding her, and that the mortgage and deed cast a cloud upon her title to the land acquired by virtue of the decree and commissioner's deed, and praying that the title to the land be quieted in her, and the deed and mortgage declared null and void. Personal service was had upon W. H. Fall, who disclaimed any interest in the premises and executed a release of the mortgage made to him by E. W. Fall. Constructive service was sought to be had upon Mrs. Eastin and E. W. Fall by publication, which service was defective as to Mrs. Eastin. This fact not appearing at the time, and default being made, a decree was entered on September 23, 1897, in favor of Mrs. Fall in accordance with the prayer of her petition. Within five years thereafter, upon Mrs. Eastin's application, this default judgment was opened under the statutory provisions and she was allowed to defend. Mrs. Eastin filed an answer, which pleads, in substance, that the petition does not state a cause of action; and in addition thereto sets forth her loan of one thousand dollars to E. W. Fall, the taking of the note signed by E. W. and W. H. Fall therefor, the giving of the indemnity mortgage to W. H. Fall and the subsequent execution of the deed by E. W. Fall to her in satisfaction of the debt. She further alleged the bona fides of the transaction, and denied the remaining allegation of the petition. No appearance was made by E. W. Fall and no personal service was had upon him. Trial was had, ¹²⁴ the issues found in favor of the plaintiff, Sarah S. Fall, and a decree rendered accordingly. The case is now before us upon appeal by Mrs. Eastin from this judgment of the district court.

The contentions of the appellant, in substance, are: That the decree of the Washington court and the deed executed by the commissioner of said court to Mrs. Sarah S. Fall are absolute nullities in so far as they relate to the land in Nebraska; that Mrs. Fall has no such title or interest in the undivided half interest in the land which had belonged to E. W. Fall that she can maintain this action; that, conceding that the Washington court had the power to compel the execution of the conveyance by E. W. Fall while he was within its jurisdiction, still since its decree acted only upon the person and not upon the land, and since no action was taken or compelled toward conveying the title to Mrs. Fall, she never acquired any interest in or title to the real estate in this state, and the decree of the Washington court utterly

failed to affect the land, or to bind or fetter any action taken by E. W. Fall after he passed beyond the jurisdiction of that court. She further contends that by the laws of this state the courts of Nebraska are not permitted, by a decree in a divorce proceeding, to take the title of real estate from the husband and vest it in the wife, by way of adjusting the equities of the parties in the property of the husband, and that such a proceeding would be in violation of the law and public policy of this state. Upon the other hand, the appellee, Mrs. Fall, contends that the decree of the Washington court in the proceedings for divorce and for a division of the property fixed the equities and bound the conscience of the parties, and created a personal legal contract of record on the part of E. W. Fall to make a conveyance of his interest in the land, which he could not escape by going beyond the jurisdiction of the Washington court, and that the decree is entitled to the same faith and credit in the courts of this state that it has in the courts of Washington; that Mrs. Fall's rights in and to the land, acquired by virtue of the ¹²⁵ decree, are sufficient to enable her to maintain an action in this state for the purpose of quieting her title to the land; that the decree of the Washington court bound E. W. Fall to such an extent that neither he nor his privies could afterward set up any right or title in the Nebraska lands against her, and that Mrs. Eastin acquired no right, title or interest in the land by virtue of the deed from E. W. Fall or the mortgage to W. H. Fall, and that the same were fraudulently made.

If the Washington court had taken the value of the Nebraska land into consideration in fixing the rights of the parties and rendered a money judgment accordingly, such a judgment might be enforced here under the full faith and credit clause of the United States constitution, since the court had full power and jurisdiction to render the same: *Barber v. Barber*, 21 How. (U. S.) 582, 16 L. ed. 226; *Trowbridge v. Spinning*, 23 Wash. 48, 83 Am. St. Rep. 806, 62 Pac. 125, 54 L. R. A. 204. And this has been the usual method in such cases: 2 Bishop on Marriage, Divorce and Separation, sec. 1123. But what power had the Washington court to affect the title to the land or to confer equities therein by its decree? The purpose of the statutes of Washington referred to evidently was to give to the courts of that state powers with reference to the ascertainment of the duties of

the parties with reference to property, growing out of the marriage relation, of the same nature as those which are enjoyed by courts generally having jurisdiction over divorce, alimony and the custody and support of children, but greater in extent than those enjoyed by the courts of some states. This power was unknown to the unwritten law, and when no statute exists the courts do not possess it: 2 Bishop on Marriage, Divorce and Separation, sec. 1119. The power thus given is to be exercised in connection with the proceedings concerning the marriage status: 2 Bishop on Marriage, Divorce and Separation, sec. 826. It is remedial and ancillary to the divorce proceedings, and not independent. In that state the same marital duties, which are enforced here by way of alimony, may be enforced by the compulsory division of real estate belonging ¹²⁶ to either spouse. This division of property is not based upon the view that the innocent party has an equitable interest in the property itself, but upon the fact that it is the duty of a husband to provide for, support and maintain his wife in such manner as suits and accords with his pecuniary circumstances and station in life, so that she, being innocent, shall not suffer from his fault. It is of the same nature as that exercised by the courts of Nebraska in awarding permanent alimony. In such case it is the duty of the court to consider the condition, situation and standing of the parties, financial and otherwise, the duration of the marriage, the amount and value of the husband's estate, the source from which it came, and the necessity for the support and education of children. It is a method of enforcing the duty of support and maintenance: *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; *Shafer v. Shafer*, 10 Neb. 468, 6 N. W. 768; *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942; *Zimmerman v. Zimmerman*, 59 Neb. 80, 80 N. W. 643; *Smith v. Smith*, 60 Neb. 273, 83 N. W. 72.

It is well established that a court of chancery, in a proper case, has power to compel a conveyance of lands situated in another country or state, where the persons of the parties interested are within the jurisdiction of the court. It is said by Justice Story: "The ground of this jurisdiction is that courts of equity have authority to act upon the person: 'Aequitas agit in personam.' And although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land, and com-

pel him to perform his agreement according to conscience and good faith": 2 Story on Equity Jurisprudence, 13th ed., sec. 743; 3 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1318. The leading case upon this doctrine in England is *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, in which the chancellor of England decreed a specific performance of a contract respecting lands lying in North America. This case was followed in *Massie v. Watts*, 6 Cranch (U. S.), 148, 3 L. ed. 181, in a learned opinion by Chief Justice Marshall, who examined and reviewed ¹²⁷ the cases prior to *Penn v. Lord Baltimore*, and announced the rule as follows: "Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, or trust, or of contract, the jurisdiction of a court of chancery is sustainable, wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

This case settled the law upon this point, and its principal doctrine has ever since been recognized and enforced by the courts of chancery in this country. But, says Judge Story: "Still it must be borne in mind that the doctrine is not without limitations and qualifications; and that to justify the exercise of the jurisdiction in cases touching lands in a foreign country the relief sought must be of such a nature as the court is capable of administering in the given case. We have already seen that a bill for a partition of lands in a foreign country will not be entertained in a court of equity, upon the ground that the relief cannot be given by issuing a commission to such foreign country. Perhaps a more general reason might be given, founded upon the principles of international law; and that is, that real estate cannot be transferred or partitioned or charged, except according to the laws of the country in which it is situated": 2 Story's Equity Jurisprudence, 13th ed., sec. 1298.

It is conceded by the appellee that the decree of the Washington court has no force and effect on the title to property here, but it is contended, mainly upon the authority of *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621, that, though the decree of the court of Washington could not affect the title to land in this state, yet when this decree is pleaded in the Nebraska court as a cause of action, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled in the divorce case. A num-

ber of cases have been cited in which it is said this principle ¹²⁸ is upheld, but we have yet been unable to find a single case in which the direct question at issue was whether or not a decree affecting the title to real estate lying in another state will be recognized in the state in which the land lies, where no conveyance has been made in obedience to the decree, and where the title has been conveyed to third parties. It is true that in *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 19 L. ed. 604, and in *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, 42 L. ed. 733, there are certain obiter expressions which are quoted in support of such doctrine, but in these cases this question was not before the court for decision, in *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 19 L. ed. 604, an instrument having been executed in performance of the decree, and in *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, 42 L. ed. 733, the case was decided upon another point. We think there can be no doubt that, where a court of chancery has by its decree ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by reason of such compulsion is valid and effectual, wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed. *Gilliland v. Inabnit*, 92 Iowa, 46, 60 N. W. 212, was a case of this kind, where the controversy was between the plaintiff, who was the grantee in a conveyance of land in Iowa, which had been compelled by a Kentucky court, and the heirs of her grantor. The Iowa court held that the decree of the Kentucky court established the trust, and that the conveyance made in consequence of such decree was valid and effectual to convey the Iowa land, even though made by compulsion and by imprisonment of the grantor.

It is said by Mr. Freeman in an exhaustive note to *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89: "From ¹²⁹ the very nature of the property, land must be governed by the *lex loci rei sitae*. No judgment of a court of another jurisdiction can have any effect upon the title to the property.

And the power of equity in decreeing the conveyance of land is effectual only upon the person, not upon the land. The decree does not change the title to the land. It remains the same as before until the person in whom the title resides either voluntarily or perforce obeys the decree of the court and divests himself of the title by a conveyance valid under the *lex loci*. The decree of chancery, then, with respect to realty beyond its jurisdiction, can have no direct operation upon the property, and per se in no way affect the legal or equitable title thereto: *Carrington v. Brents*, 1 McLean (U. S.), 167, Fed. Cas. No. 2446; *Massie v. Watts*, 6 Cranch (U. S.), 148, 3 L. ed. 181; *Hawley v. James*, 7 Paige Ch. (N. Y.) 213, 32 Am. Dec. 623; *Proctor v. Ferebee*, 1 Ired. Eq. (N. C.) 143." See, also, *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298; *Westlake on Private International Law*, 64; *Proctor v. Proctor*, 215 Ill. 275, 106 Am. St. Rep. 168, 74 N. E. 145, 69 L. R. A. 673, and note.

In *Wimer v. Wimer*, 82 Va. 890, 3 Am. St. Rep. 126, 5 S. E. 536, it is said, speaking of cases under the general rule: "But even as to these cases it must be borne in mind that the decrees of the foreign court do not directly affect the land, but operate upon the person of the defendant, and compel him to execute the conveyance, and it is the conveyance which has the effect, and not the decree": Citing *Davis v. Headley*, 22 N. J. Eq. 115; 4 Minor's Institutes, pt. 2, p. 1201.

In *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802, 15 Atl. 379, 1 L. R. A. 79, it is said: "The principle upon which this jurisdiction rests is, that chancery, acting in *personam* and not in *rem*, holds the conscience of the parties bound without regard to the situs of the property. It is a jurisdiction which arises when a special equity can be shown which forms a ground for compelling a party to convey or release, or for restraining him from asserting a title or right in lands so situated, and is strictly limited to those cases in which the relief decreed can be obtained through the¹³⁰ party's personal obedience. . . . The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment or like process, against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer or vest a title": *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. Rep. 960, 35 L. ed. 640; *Bullock v. Bullock*, 52 N. J. Eq. 561, 46 Am.

St. Rep. 528, 30 Atl. 676, 27 L. R. A. 213; Story's Conflict of Laws, 8th ed., sec. 543; 1 Wharton on Conflict of Laws, 3d ed., secs. 288, 289; Watkins v. Holman, 16 Pet. (U. S.) *25, 10 L. ed. 873; Northern I. R. Co. v. Michigan C. R. Co., 15 How. (U. S.) 233, 14 L. ed. 674; Davis v. Headley, 22 N. J. Eq. 115; Miller v. Birdsong, 7 Baxt. (Tenn.) 531; Gardiner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Hayden v. Yale, 45 La. Ann. 362, 40 Am. St. Rep. 232, 12 South. 633; Allen v. Buchanan, 97 Ala. 399, 38 Am. St. Rep. 187, 11 South. 777; Langdon v. Sherwood, 124 U. S. 74, 8 Sup. Ct. Rep. 429, 31 L. ed. 344; Clarke's Appeal, 70 Conn. 195, 39 Atl. 155, affirmed in Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. Rep. 873, 44 L. ed. 1028; note to Proctor v. Proctor, 215 Ill. 275, 106 Am. St. Rep. 178, 74 N. E. 145, 69 L. R. A. 673; Short v. Galway, 83 Ky. 501, 4 Am. St. Rep. 168.

The case of Bullock v. Bullock, 52 N. J. Eq. 561, 46 Am. St. Rep. 528, 30 Atl. 676, 27 L. R. A. 213, deserves special examination. In this case the complainant's husband had been adjudged by the supreme court of the state of New York, in a divorce proceeding of which it had jurisdiction, to execute a mortgage upon lands in New Jersey to secure the payment of a certain sum per month to the complainant as alimony. He refused to do so, and made other mortgages and conveyances of the lands, which the wife alleged were fraudulently made for the purpose of defeating her rights. She charged that she had acquired an equitable lien in the lands by virtue of the New York decree, and prayed the court to set aside the several mortgages and conveyances, and that he be decreed to execute and deliver the mortgage required by the New York court. It will be seen, therefore, that the case was similar to the one at bar, but it was stronger in this respect, that personal service was had upon the respondent in New Jersey in the action to enforce the decree, while in this case, no personal service has been had upon E. W. Fall. The majority of the court held that, while the New York court ¹³¹ might have enforced the execution of the mortgage by the defendant while he was within its jurisdiction, this not having been done, the New York decree could not operate as a cause of action affecting the title to land in New Jersey, and it is pointed out that "the doctrine that jurisdiction respecting lands in a foreign state is not in rem, but one in personam is bereft of all practical force if the decree in personam is conclusive and must be

enforced by the courts of the situs," and that such a doctrine would result in practically depriving a state of that exclusive control over its real estate which has always been accorded. Justice Garrison concurred upon the ground that the decretal order was only ancillary to the divorce suit, and "did not possess any element of a judgment upon the issue submitted to the court of decision, which was whether the marriage between the parties should be dissolved." Justice Van Syckel, in a dissenting opinion, said that the New York judgment was conclusive as to the right of the wife to have him execute a mortgage on the New Jersey land, and that, since the courts of New Jersey would have afforded such relief if the action had been brought in that state, the judgment imposed an obligation upon the husband which could be enforced in New Jersey by the intervention of a court of equity there. In this connection, however, he says: "The question is whether our court of equity will establish a lien upon the New Jersey land so as to give effect to the New York decree. It may be conceded that the *lex fori* must apply to the remedy to enforce the New York judgment in our courts: *Harker v. Brink*, 4 Zab. (24 N. J. L.) 333; *Garr v. Stokes*, 1 Harr. (16 N. J. L.) 403; *Armour v. McMichael*, 7 Vroom (36 N. J. L.), 92. While we will give full faith and credit to the New York judgment, we cannot be asked to give greater efficacy to a decree for alimony made in New York than we can give to a like decree made in our own courts. For instance, if the common law prevailed here we would enforce the New York decree for alimony only according to the common-law practice, for that would exhaust our powers in that ¹³² respect. . . . It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands, we cannot refuse like relief in this case on the extraterritorial judgment; *Huntington v. Attrill*, 146 U. S. 657; 13 Sup. Ct. Rep. 224, 36 L. ed. 1123; *McElmoyle v. Cohen*, 13 Pet. (U. S.) *312, 10 L. ed. 177." It will be seen, therefore, that neither the opinion of the majority or of the minority of the New Jersey court in *Bullock v. Bullock*, 52 N. J. Eq. 561, 46 Am. St. Rep. 528, 30 Atl. 676, 27 L. R. A. 213, would warrant the granting of the relief sought in this case, since the appellee is asking the court to give effect to a decree of the Washington court which it would not enforce if it had been rendered in a court of this state, and that, if the view expressed by Justice Gar-

ri-son is correct, as to which we express no opinion, the decree adjudging the land to Mrs. Fall is only of the nature of a decretal order, ancillary to the subject matter of the suit, which was the matrimonial status, and is not such a judgment as is entitled to full faith and credit under the constitution and laws of the United States. From a consideration of these authorities, and upon principle, it seems clear that a decree of a court of chancery in a foreign state acting upon a person within its jurisdiction and directing him to make a conveyance of lands in this state in nowise affects the title to the land. The decree and order acts only upon the person, and, if obedience to its mandate is refused, it can only be enforced by the means which have from time immemorial been the weapons of a court of chancery. To say that the decree binds the conscience of the party, so that persons to whom he may convey the land thereafter take no title, is the same as saying that the decree affects the title, which is beyond the power of the courts of another state to do. The transfer and devolution of title to real estate within the limits of a state is entirely subject to the laws of that state and no interference with it can be permitted by other states: *Watts v. Waddle*, 6 Pet. (U. S.) *389, 8 L. ed. 437; *Davis v. Headley*, 22 N. J. Eq. 115; *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. Rep. 873, 44 L. ed. 1028; *Wimer v. Wimer*, 82 Va. 890, 3 Am. St. Rep. 126, 5 S. E. 536; *Bowdle v. Jencks*, 18 S. Dak. 80, 99 N. W. 98; *Manton v. Seiberling & Co.*, 107 Iowa, 534, 78 N. W. 194. The law will not permit ¹³⁸ that to be done indirectly which cannot be done directly, and, if the courts of other states can so adjudicate the rights of parties to land in this state that a title apparently clear upon the official records could be made null and void by its action "upon the conscience" of the holder of the legal title, the recording acts of this state would cease to afford protection to purchasers of land, and thus the title in fact be affected, and the power of the state over the transfer and devolution of lands interfered with.

If the Washington decree bound the conscience of E. W. Fall, so that when he left the jurisdiction of that state any deed that he might make would be absolutely void, and had he sold the land to an innocent purchaser, who had inspected the records and found that he was the owner in fee of an undivided one-half interest to the premises, such purchaser, though relying on the laws of this state for his protection,

would receive no title. This is the contention of the appellee, carried to its ultimate conclusion, and, if this is correct, the action of the court of another state directly interferes with the operation of the laws of this state over lands within its sovereignty.

Under the laws of this state the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and in such an action have no power or jurisdiction to divide or apportion the real estate of the parties: *Nygren v. Nygren*, 42 Neb. 408, 60 N. W. 885; *Brotherton v. Brotherton*, 14 Neb. 186, 15 N. W. 347; *Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28; *Aldrich v. Steen*, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311. In the *Cizek* case, *Cizek* brought an action for divorce, and his wife filed a cross-bill and asked for alimony. The court dismissed the husband's bill, found in favor of the wife and, by a stipulation of the parties, set off to the wife the homestead, and ordered her to execute to the husband a mortgage thereon, thus endeavoring to make an equitable division of the property. Afterward, in a contest arising between the parties as to the right of possession of the property, the decree was pleaded as a source of title in the wife, but it was held that that portion of the decree which ¹³⁴ set off the homestead to the wife was absolutely void and subject to collateral attack, for the reason that no jurisdiction was given to the district court in a divorce proceeding to award the husband's real estate to the wife in fee as alimony. The courts of this state in divorce proceedings must look for their authority to the statute, and, so far as they attempt to act in excess of the powers therein granted, their action is void and subject to collateral attack. A judgment or decree of the nature of the *Washington* decree, so far as affects the real estate, if rendered by the courts of this state, would be void.

Is it our duty to give effect to this decree under the full faith and credit clause of the constitution of the United States? "These provisions of the constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject matter or of the parties, . . . and they confer no new jurisdiction on the courts of any state; . . . nor do these provisions put the

judgments of other states upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the state in which they are sued on, pleaded, or offered in evidence": *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. ed. 1123. The provision of the constitution establishes a rule of evidence rather than of jurisdiction: *Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478; *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29 L. ed. 535; *State v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. Rep. 1370, 32 L. ed. 239. We know of no rule which compels us to give to a decree of the courts of Washington a force and effect we would deny to a decree of our own courts upon the same cause of action. We must accord full faith and credit to the divorce decree since the Washington court had jurisdiction to render it, but we are not compelled to recognize a decree affecting the title of E. W. Fall and his grantees in an action where he is not in court by personal service, and where the act directed by the Washington court is in opposition to ¹⁸⁵ the public policy of this state, in relation to the enforcement of the duty of marital support: *Anglo-American Provision Co. v. Davis*, 191 U. S. 373, 24 Sup. Ct. Rep. 92, 48 L. ed. 225; *State v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. Rep. 1370, 32 L. ed. 239; *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. Rep. 555, 45 L. ed. 810; *McElmoyle v. Cohen*, 13 Pet. (U. S.) *312, 10 L. ed. 177; *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435; *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. Rep. 237, 47 L. ed. 366. In order to vest Mrs. Fall with any right, title or interest in and to her husband's land in Nebraska by virtue of the Washington decree, it was absolutely necessary that the decree be carried into effect by that court by compelling a conveyance from her husband. Neither the decree nor the commissioner's deed conferred any right or title upon her. The decree is inoperative to affect the title to the Nebraska land, and is given no binding force or effect, so far as the courts of this state are concerned, by the provisions of the constitution of the United States with reference to full faith and credit. Since the decree upon which the plaintiff bases her right to recover did not affect the title to the land, it remained in E. W. Fall until divested by operation of law or by his voluntary act. He has parted with it to Elizabeth Eastin, and whether any consideration was ever paid for it

or not is immaterial so far as the plaintiff is concerned, for she is in no position to question the transaction, whatever a creditor of Fall might be able to do. In whatever manner the result of our conclusion may affect the parties to this controversy, it is our duty to sustain the rights of the state to sovereignty over the land within its borders, and to resist an attempt to convey and set apart real estate in Nebraska by the court of another state, when not acting upon and through the person of the owner when under its jurisdiction and by virtue of the proper powers of a court of chancery.

It appears that Mrs. Fall has paid taxes and interest and made other outlays for the benefit of the property, for which she should be reimbursed. The former judgment of this court is vacated and the cause reversed and ¹³⁶ remanded to the district court, with directions to proceed in accordance with this opinion, and, if plaintiff so desires, to take an accounting of the rents and profits and disbursements, and to render such decree as may be equitable.

Mr. Chief Justice Sedgwick Dissented, and contended that while a court in one state cannot, by its decree, directly affect the legal title to land situated in another, yet if all the parties interested in the land are brought personally before the court, its decree establishing their equities in the land is conclusive upon them, and thus, in effect, determines the title to the land. Hence if both parties to a divorce proceeding in one state have appeared before a court of general jurisdiction therein, and have asked such court to distribute their property, including land in another state, and the court by its decree has done so, such decree is conclusive of the equities of the parties in the real estate situated in such state, so that if one of the parties in violation of such decree, attempts to convey such land to a purchaser with notice of such equities, the latter takes subject thereto.

The Effect of Judgments of the Courts of a Sister State or of a foreign country is considered in the notes to Montgomery v. Consolidated etc. Co., 103 Am. St. Rep. 304; Tremblay v. Aetna Life Ins. Co., 94 Am. St. Rep. 32. That the judgment of a court of a sister state may be impeached for a want of jurisdiction in the court which rendered it, see Cuykendall v. Doe, 129 Iowa, 453, 113 Am. St. Rep. 472; Ingraham v. Ingraham, 143 Ala. 129, 111 Am. St. Rep. 31; Tremblay v. Aetna Life Ins. Co., 97 Me. 547, 94 Am. St. Rep. 521, and note.

If a Decree Determines the Equities of the Parties in Respect to Land in another state, and directs a conveyance in accordance therewith, such decree, while it does not operate to transfer the title, may be pleaded as a cause of action or as a defense in the courts of the state where the land is situated, and is there entitled to the force

and effect of record evidence of the equities determined: *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908. But a default divorce decree purporting to vest in the complainant an interest in land of the defendant situated in another state is in that respect without jurisdiction: *Proctor v. Proctor*, 215 Ill. 275, 106 Am. St. Rep. 168.

BEBER v. BROTHERHOOD OF RAILROAD TRAIN-MEN.

[75 Neb. 183, 106 N. W. 168.]

INSURANCE, ACCIDENT—Loss of Hand—What is.—It is a proper question for the jury to determine whether a total loss of three fingers with injury to the remaining finger and thumb, and the removal of nearly half of the palm of the hand, constitute a total loss of the hand within the meaning of a by-law of a mutual benefit society providing insurance for “any member in good standing suffering, by means of physical separation, the loss of a hand at or above the wrist joint.” (p. 786.)

Mockett & Polk, for the plaintiff in error.

Stewart & Munger, for the defendant in error.

¹⁸⁴ **OLDHAM, C.** On the second day of May, 1900, the plaintiff in error, who was plaintiff below, became a member of a fraternal benefit society, known as the Brotherhood of Railroad Trainmen, and agreed to pay monthly assessments of two dollars a month on a beneficiary certificate issued to him by said society in the sum of twelve hundred dollars. The plaintiff was a brakeman, and belonged to the class of risks called “Class C” in the constitution of the society. By section 37 of the constitution of the order it is provided that the member shall be entitled to the amount of his certificate “upon his becoming permanently and totally disabled within the meaning of section 45.” Section 45 is as follows: “Any member in good standing, suffering, by means of physical separation, either the loss of a hand at or above the wrist joint, or suffering the loss of a foot at or above the ankle joint, or suffering the loss of the sight of both eyes, shall be considered totally and permanently disabled and shall receive the full amount of his beneficiary certificate, but not otherwise.” On the tenth day of May, 1902, while the beneficiary certificate was in full force and effect, plaintiff received a personal injury by chopping and

cutting his left hand, while splitting wood, and as a result of this injury lost his second, third and fourth fingers and about half of the second, third and fourth metacarpal bones, which removed nearly half of the palm of his hand, damaged the first and second joints of the index finger, and caused a running sore on the thumb between the second and third joints, which stiffened and impaired the motion of the thumb and practically destroyed its usefulness. Plaintiff's testimony tended to show that this injury had totally destroyed the usefulness of the hand, as such, while the evidence offered by defendant tended to show that the remaining thumb and finger on the hand and the partially stiffened wrist joint were of some utility to the plaintiff. In this state of the record, when the testimony was all in, the court, being of the opinion that, under section 45 of the defendant's constitution, ¹⁸⁵ plaintiff was only entitled to recover on proving that the entire hand was severed at or above the wrist joint, directed a verdict for defendant and rendered judgment for the defendant on the verdict so directed. To reverse this judgment plaintiff brings error to this court.

That plaintiff's benefit certificate is a contract of insurance between him and the society is both apparent and conceded, and that his right to recover depends upon a construction of the contract as set forth in section 45 of the constitution is also conceded by both parties to the controversy. Eliminating from this section all points not applicable to the case at bar, it would read as follows: Any member in good standing suffering, by means of physical separation, the loss of a hand at or above the wrist joint shall be considered totally and permanently disabled, and shall receive upon sufficient and satisfactory proof of the same, the full amount of his beneficiary certificate, and not otherwise. Now, the question to be determined is, What did the defendant company contract to insure against under the provisions of this by-law? Was it the severance of the entire hand at or above the wrist joint, or was it the entire loss of the use of the hand at or above the wrist joint by physical separation? If the only risk assumed by defendant was the amputation of the whole hand, then the learned trial court was fully justified in directing a verdict for defendant, but if a fair and liberal interpretation of the contract most favorable to the insured can make it a risk which includes the total loss of the use of the hand by severance,

then the question as to whether such loss is established by the evidence is properly one for the triers of such facts. If the officers of the society, who prepared the by-law in which the contract is set forth, have used ambiguous terms, the ambiguities must be interpreted in the manner most favorable to the insured. If, instead of stating in plain and simple language the exact loss they intend to protect against, they propound riddles in a jargon of equivocal phrases, these riddles should be solved most favorably to him who has been the victim of such artifice. Interpreted ¹⁸⁶ in this spirit, can the by-law of the defendant be reasonably said to protect against the entire loss of the hand by physical separation, whether such loss be occasioned by amputation or by an injury by severance which totally destroys the usefulness of such member?

In *Lord v. American Mutual Acc. Assn.*, 89 Wis. 19, 46 Am. St. Rep. 815, 61 N. W. 293, 26 L. R. A. 741, under a policy containing a provision for the payment for an injury "causing an immediate, continuous and total disability," it was held that it was a proper question for the jury to determine whether a total loss of three fingers and part of another on the same hand, and destruction of the joint of the thumb, and the cutting of the hand, constituted a total loss within the meaning of such provision. In disposing of this question, Cassoday, J., speaking for the court, said: "On the part of the defendant it is contended that there is no such thing as the loss of the hand unless the injury is such as to require the amputation of the hand above the wrist. That would be too much of a refinement upon language for practical purposes. The hand was for use; and, if it was injured so as to become useless as a hand, then the defendant became liable for its loss under the contract." This was held, in principle, in *Sheanon v. Pacific M. L. Ins. Co.*, 77 Wis. 618, 83 Wis. 507. In *Sneck v. Travelers' Ins. Co.*, 88 Hun, 94, 34 N. Y. Supp. 545, the action was on a policy against "a loss by severance of one entire hand or foot." There was a loss of a part of the hand by severance. Plaintiff testified that he had no use of the hand, as such. The court held that the word "severance" in the policy meant the method by which the accident occurred, and that it was the loss of the use of the hand that was insured against, and that the question as to whether the loss was total under the evidence was one of fact for the jury. While the supreme

court was divided on this question and at the first hearing of the same case, reported in 81 Hun (N. Y.), 331, 30 N. Y. Supp. 881, indicated a different conclusion, yet the last decision was reviewed by the court of appeals in 156 N. Y. 669, 50 N. E. 1122, and the last majority opinion of the intermediate court was approved, without ¹⁸⁷ division, by the court of appeals. The doctrine announced in this case is quoted with approval in 1 American and English Encyclopedia of Law, second edition, page 301, wherein it is said: "Many of the companies have altered their policies so as to read 'the loss of feet or hands by severance' thereof, but this provision has been held to be intended to refer to the manner rather than to the exact physical extent of the injury."

Defendant's counsel cite us to the holding in Fuller v. Locomotive Engineers M. L. & A. Ins. Assn., 122 Mich. 548, 80 Am. St. Rep. 598, 81 N. W. 326, 48 L. R. A. 86, as supporting the conclusion reached by the trial judge in the court below. After a careful examination of this very well-considered case, we are satisfied that, instead of supporting the theory of the trial judge in the instant case, it makes directly against it. In this case the by-law provided that any member receiving bodily injuries which alone should "cause amputation of a limb (whole hand or foot)" should receive the amount of the certificate, but not otherwise. Plaintiff sustained a loss of a portion of his foot. While the conclusion reached was that, under this peculiar contract, he could not recover, yet, in reaching this conclusion, the learned author of the opinion reviewed with approval the conclusions reached in the cases above cited, and other cases of the same import, and distinguished the case he was deciding by saying: "These cases establish the proposition that where an insurance policy insures against the loss of a member, or the loss of an entire member, the word 'loss' should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application. In all of these policies the word 'loss' is used, and it is the loss of the member that is in terms insured against. As indicated in the last authority cited, the attempts of the insurance companies to avoid this construction by so changing the policy that it reads, 'loss by severance of feet or

hands,' have failed; the courts holding, as before, that it is the loss of the use of the member which was the object of the contract. In the present case the word 'loss' ¹⁸⁸ is eliminated, and the insurance is against 'an injury that shall cause the amputation of a limb (whole hand or foot), or total and permanent loss of eyesight.' "

We are therefore of opinion that the question of whether there was a total loss of the use of plaintiff's hand, at or above the wrist joint, under the evidence contained in the bill of exceptions, is one of fact for the jury, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

Letton and Ames, CC., concur.

By the COURT. For the reasons given in the above opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

Holcomb, C. J., expresses no opinion.

The Amputation of an Arm a little below the elbow is the "loss of an arm" within the meaning of that term as used in a certificate of a benefit association agreeing to indemnify the holder for the loss of an arm, without specifying what part thereof shall be lost: *Garcelon v. Commercial Travelers' etc. Assn.*, 184 Mass. 8, 100 Am. St. Rep. 540, and see the cases cited in the cross-reference note thereto.

LANGE v. ROYAL HIGHLANDERS.

[75 Neb. 188, 106 N. W. 224, 110 N. W. 1110.]

BENEFICIAL ASSOCIATIONS—Future By-laws, Agreement to be Bound by.—A member of an association who agrees before becoming such that he will comply with the by-laws then in force, or which may be thereafter adopted, is bound by subsequently adopted by-laws, if they are reasonable in their nature. (p. 788.)

BENEFICIAL ASSOCIATIONS—Subsequently Adopted By-law Against Suicide.—A member of a fraternal benefit association who contracts to be bound by subsequently enacted by-laws is bound by a by-law so enacted, forfeiting his right to recover on a certificate insuring his life, in case his death is caused by suicide, whether sane or insane. (pp. 788, 789.)

INSURANCE, LIFE—Forfeiture, Construction of Clauses for.—A by-law adopted after the issuing of a certificate of insurance providing for a forfeiture will be strictly construed most strongly against the association, and if passed in contravention of the provisions

either of the articles of association, the constitution and by-laws of the society, or the statute governing it, is void. (p. 789.)

CORPORATIONS—Power to Enact By-laws.—The inherent right to enact by-laws for the government of a corporation is in the stockholders, and this right can be exercised by a board of directors or other similar body only when such right is clearly conferred by the rules of the society and the statute of the state governing the corporation. (p. 791.)

A FRATERNAL BENEFIT ASSOCIATION must Have a Representative Form of Government.—This requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, must be chosen by the members. (p. 791.)

BENEFICIAL ASSOCIATIONS—Form of Government.—A fraternal benefit association must have a representative form of government when required to do so by statute, and this requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, shall be chosen by the members. (p. 794.)

BENEFICIAL ASSOCIATIONS—Change in By-laws.—If a beneficial association has not complied with a statute requiring it to adopt a representative form of government, its governing body has no power to adopt and promulgate any edict or by-law changing the nature and obligation of the contract with the insured member. (p. 795.)

BENEFICIAL ASSOCIATIONS—Change in By-laws—Collateral Attack.—An attack by a member upon the validity of an edict or by-law of a beneficial association, by which it is sought to vary or change the obligations of a contract which it has made with him, or for his benefit, on the ground that it is beyond the power of the society to make such change, is not a collateral attack upon its organization, or its right to carry on the business for which it was created. (p. 796.)

INSURANCE, LIFE.—Suicide will not Defeat Recovery upon a contract of life insurance made by a member with a beneficial association, and not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms. (p. 799.)

M. D. Carey and J. J. Thomas, for the plaintiff in error.

R. S. Norval and Hainer & Smith, for the defendant in error.

189 OLDHAM, C. This was an action by the plaintiff in the court below in her own right, and as guardian and next friend of her minor son, to recover the sum of two thousand dollars on a benefit certificate issued August 14, 1897, upon the life of Alexander D. Lange, by the Royal Highlanders, a fraternal benefit society organized under the laws of the state of Nebraska. The defense interposed was that Alexander D. Lange had come to his death from wounds inflicted

by his own hand with suicidal intent. On issues thus joined there was a trial to the jury, and at the close of all the testimony the court directed a verdict for the defendant. Judgment was entered on this verdict, and to reverse this judgment plaintiff brings error to this court.

The facts underlying this controversy, which are either admitted or fully established by the proofs offered, are: That on August 14, 1897, the deceased, Alexander D. ¹⁹⁰ Lange was duly admitted to membership in the defendant society and received a certificate of indemnity for the amount sued for in the petition, payable at his death to the beneficiaries therein named; that by the application and certificate of indemnity it was agreed that the insured should comply with the edicts of the association then in force and such as thereafter should be enacted; that at the time the deceased was admitted to membership there was no edict or by-law of the society providing for a forfeiture of the policy if the member came to his death by suicide, whether sane or insane. It is clearly established by the proofs offered that on June 26, 1902, Alexander D. Lange died from the effects of a gunshot wound inflicted by his own hand with suicidal intent, and that on June 12, 1901, the executive castle of the defendant association assumed to pass and establish an edict or by-law which provides as follows: "The benefit certificate issued to a member shall become void and all benefits thereunder shall be forfeited in case the member shall die from suicide, feloniously or otherwise, sane or insane."

There are certain underlying propositions, sound in principle and supported by the former decisions of this and other courts of last resort, that govern the rights and liabilities of members of voluntary associations, whether mutual insurance companies or fraternal benefit societies, that are applicable, in the first instance, to the questions involved in this controversy. One of these principles is that a member of such society, who agrees in his application, or has the agreement incorporated in his policy or benefit certificate, that he will comply with the by-laws of the company then in force or thereafter to be adopted, is bound by subsequent by-laws the same as those in force at the time his certificate was issued, provided that such subsequent by-laws are reasonable in their nature, and are properly adopted in conformity with the rules of the order and the statute governing such associations:

Farmers' Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926. Another underlying principle established by ¹⁹¹ the clear weight of authority is that, where a member of a fraternal benefit association contracts in his application or certificate of membership to be bound by subsequently enacted by-laws, a by-law, properly enacted, providing for the forfeiture of a certificate where the death of the members is occasioned by suicide, whether sane or insane, is a reasonable by-law and will be upheld: *Hughes v. Wisconsin Odd Fellows' Mutual Life Ins. Co.*, 98 Wis. 292, 73 N. W. 1015, and cases therein cited. Another well-established principle is that a subsequent by-law providing for a forfeiture will be strictly construed most strongly against the association, and if passed in contravention of the provisions either of the articles of association, the constitution and by-laws of the society, or the statute governing it, it will be held ultra vires and of no effect: *Briggs v. Earl*, 139 Mass. 473, 1 N. E. 847; *Supreme Council A. H. L. v. Perry*, 140 Mass. 580, 5 N. E. 635; *Supreme Lodge K. of P. v. Kutscher*, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; *Supreme Lodge K. of P. v. La Malta*, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; *Supreme Lodge K. of P. v. Stein*, 75 Miss. 107, 65 Am. St. Rep. 589, 21 South. 559, 37 L. R. A. 778. Again it is well established that, where the exercise of corporate power has been regulated by statute, the corporation cannot, by its by-laws, resolutions or contracts, change the mode of the exercise of this power: *Thompson on Corporations*, secs. 849, 1013; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

From these principles it follows that the only question to be determined is as to whether the by-law relied upon as a defense has been legally enacted by a duly authorized body of the defendant association. This question requires an examination into the articles of incorporation and by-laws or edicts of the society, as well as the provisions of the statutes of the state regulating fraternal benefit associations. From the evidence contained in the record it appears that at some time prior to June, 1896, six persons conceived the idea of organizing the society known as the "Royal Highlanders"; that these six members constituted themselves the executive castle of the order, with ¹⁹² plenary powers in the organization. On August 10, 1896, the society commenced business with a membership of three hundred and eleven, and properly

filed its articles of incorporation. It appears from the testimony that there never was a meeting of the members of the association, and that the officers were never voted on, either directly or indirectly, by the policy-holders of the order. On June 14, 1897, the executive castle, which had in the meantime increased its number to twelve members, together with one delegate of the association, held a meeting at which they formally elected themselves to the different offices in the executive castle for a term of four years, and adopted the edicts or by-laws in force at the time the certificate of membership was issued to Alexander D. Lange. Section 4 of the edicts so adopted provides as follows: "The executive castle shall be composed of its officers, its standing committees, its special committees, and its delegates elected by district conventions, as is hereinafter provided." In 1897 the legislature of Nebraska enacted section 6483, Cobbey's Annotated Statutes, 1905, which provides that "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with ritualistic form of work and representative form of government: Laws 1897, c. 7, sec. 1." And also enacted: "All such societies organized under the laws of this or any other state, territory or province, and now doing business in this state, may continue such business provided they hereafter comply with the provisions of this act": Laws 1897, c. 47, sec. 8. On June 12, 1901, the executive castle of the order promulgated the by-law or edict in dispute at its regular meeting. The executive castle, among other powers, was authorized to institute representative castles as might be deemed essential, in accordance with its edicts. In furtherance of this power it had, prior to the meeting in 1901, provided for the election of representatives from districts composed of tributary castles having an aggregate ¹⁹³ of not less than five hundred members, nor more than one thousand. And at the meeting at which the by-law at issue was enacted, the executive castle was composed of twenty-five members, nine of whom had been elected from representative castles and sixteen of whom were self-constituted officers and their appointees.

Now, as before stated, this executive castle had, by its own by-laws, granted itself plenary powers over the organ-

ization, and constituted itself the sole governing and law-making body of the order. Bearing in mind that the inherent right to enact by-laws for the government of a corporation is in the stockholders, and that this right can be exercised by a board of directors, or other similar body, only when such right is clearly conferred by the rules of the society and the statute of the state governing the incorporation, the question is, Was the executive castle of the defendant, constituted as above set out, a representative body of the association. A representative form of government is defined in the Universal dictionary of the English language as one "conducted and constituted by the agency of delegates, or deputies, chosen by the people." This definition fairly expresses the modern American idea of a representative government, and, as applied to section 1, *supra*, is in full harmony with the construction placed upon that section by this court in the recent case of *State v. Bankers' Union of the World*, 71 Neb. 622, 99 N. W. 531, where it was said: "A fraternal benefit association must have a representative form of government. This requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, shall be chosen by the members."

While counsel for the defendant in error have filed a very able and persuasive brief urging us to reconsider and modify the definition of a representative form of government as expressed in the case just quoted, we find ourselves, after a careful consideration of their well-written brief and strong oral argument, wholly unpersuaded ¹⁹⁴ to do so. It seems to us that it was the manifest intention of our legislature in the enactment of sections 1 and 8, *supra*, to require all fraternal benefit associations, either then doing business or which should later be organized, to conduct the affairs of the associations for the sole benefit of the members and their beneficiaries, and that to further this object they required such associations to be governed by representatives elected by the members. The fact that defendant and other similar fraternal societies had been organized without even a fair semblance of a provision for a representative form of government in its modern sense most likely influenced the lawmakers in the passage of this statute. To prevent the possibility of a self-constituted oligarchy controlling and managing any such association for its own benefit, rather than for the good of the members and their

beneficiaries, this wholesome measure was enacted. In our conception of the matter, these sections of the statute should be liberally construed for the purpose for which they were plainly enacted, for they seem to have been intended not to destroy but to save fraternal benefit societies.

It is earnestly contended by counsel for defendant in error that the attack on the suicide edict of 1901 is a collateral attack on the charter of the corporation, and it is urged that, even if the executive castle of the defendant society is illegally exercising its corporate functions, its right to do so can only be questioned in an action by the state in quo warranto. We concede the contention that the plaintiff cannot in her petition sue the defendant as a legal organization under the laws of the state, and then deny the validity of the organization. But does the denial of the authority of the executive castle, as constituted in 1901, to pass the edict in question amount to a denial of the legal authority of the society to do business? This depends on whether or not the edict assailed should be treated simply as a by-law of the association, or as part of the charter of the corporation. It is conceded in the brief of the association that, if the edict assailed is simply ¹⁹⁰⁵ a by-law and not a part of the articles of incorporation, then an attack on the passage of such edict does not necessarily call into question the right of the society to do business. As was said in *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480: "In this state the legislature does not by a special act charter a corporation, but all corporations are formed under general laws, and these laws and the articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of a corporation in this state."

By reference to section 20, chapter 47, Laws of 1897, it will be seen that the requisite of authority for a fraternal benefit association to do business in this state is the filing with the auditor of a "certificate of association," signed by the persons who desire to associate themselves together for the purpose of forming such an organization, with a plan of business clearly and fully defined. It is these articles and the plan of association that the auditor is required to pass upon, and, if found correct, it is his duty to issue a certificate of organization. At the time the certificate of association was issued to the defendant society by the auditor, the statute requiring such societies to have a representative form

of government had not been enacted, and, as the plan submitted was not then in contravention of the statute law, the auditor properly issued the certificate of organization. It is the certificate of association and the statute governing the corporation that stands in place of the charter of the association.

It is true that section 22, chapter 47, Laws of 1897, provides for the filing of the constitution and by-laws of fraternal societies with the auditor after the certificate is issued, but the auditor has nothing to do with the approval or rejection of the by-laws. It is only when it is brought to his attention that a society is doing business in contravention of the provisions of the statute that he is called upon to institute proceedings; and these proceedings are in the nature of an information in quo warranto. Moreover, the tenor and the very nature of the edict relied ¹⁹⁶ upon classify it as a by-law providing for a forfeiture of a benefit certificate, and not as a constituent element of the charter authorizing the association to transact business in this state. We conclude that the edict in issue is merely a by-law of the society enacted by an unauthorized body, and, as against a member who received his certificate of membership prior to its adoption, is ultra vires and void, and subject to attack whenever and wherever found.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

Ames and Letton, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

On rehearing the following opinion was filed February 8, 1907:

BARNES, J. This case is before us on a rehearing. The facts, as disclosed by the record, are so clearly and concisely stated ¹⁹⁷ in our former opinion, ante, p. 787, as to render any other or further statement unnecessary. Two propositions decided by that opinion are vigorously assailed by counsel for the defendant: First, that the so-called edict or by-law of June 12, 1901, which is interposed as a defense to

plaintiff's action, is void, and does not affect her right of recovery on the benefit certificate, which is the foundation of this suit; second, that suicide is not a defense to an action on such a certificate, unless made so by the contract itself, or some valid edict or by-law of the association.

1. The defendant's first contention requires but little consideration, because the reasoning and authorities contained in our former opinion fully answer the brief and argument of counsel on that point. If the statement describing the organization of the defendant, and the manner of the election or selection of its executive castle, is true—and, as its correctness has not been challenged we assume it to be so—it cannot be said that such executive castle gave to the defendant a representative form of government within the meaning of section 91, chapter 43 of the Compiled Statutes of 1905 (Annotated Statutes, 6483). At its session of 1897 the legislature of this state passed an act (Laws 1897, c. 47) providing for the organization and government of "fraternal beneficiary associations," which contains the section above mentioned. Since that time all such associations have been required, where necessary, to so change the manner of electing or choosing the officers by which their business is conducted as to give them a representative form of government: *State v. Bankers' Union of the World*, 71 Neb. 622, 99 N. W. 531. In that case it was said: "A fraternal beneficial association must have a representative form of government. This requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, shall be chosen by the members"—and the defendant therein was enjoined from transacting business until it should provide for and adopt ¹⁹⁸ such a representative form of government. It appears that the defendant association was organized in the year 1896 by six persons, residents of Aurora, Nebraska, who prepared and filed its articles of incorporation, and thereupon constituted themselves its executive castle; that on August 10th of that year the society, having then acquired a membership of three hundred and eleven persons, commenced business. It appears also that there never was a meeting of the members of the association, and said officers were never voted for, either directly or indirectly, by the policy-holders or members of the order. It further appears that in June, 1897, the first election was

held, and that on June 14, 1897, the executive castle which had in the meantime increased its own number to twelve members, including one delegate elected by the members of the association, held a meeting at which its members again elected themselves officers of the association for a term of four years and adopted the edicts or by-laws in force at the time the certificate in question herein was issued to Alexander D. Lange. The affairs of the association are conducted by its executive castle, and section 4 of the edicts adopted by that body provides: "The executive castle shall be composed of its officers, its standing committees, its special committees and its delegates elected by district conventions, as hereinafter provided." After the passage of the act of 1897, above mentioned—the association presumably recognizing the fact that its form of government should be changed so as to comply with said law, and thus enable it to continue its business—the executive castle in December, 1897, at a special meeting, provided for a change in the manner of its own selection; and on June 12, 1901, when the by-law or edict in dispute was adopted and promulgated, said executive castle was composed of twenty-five members, nine of whom had been elected from representative districts, and sixteen of whom were the self-constituted officers above mentioned, and their own appointees. That this was not a fair compliance with the provision of the law requiring the defendant to have a representative form of government ¹⁹⁹ does not appear to us to be an open question. It follows, both upon principle and authority, that it had no power to adopt and promulgate any edict or by-law changing the nature and obligation of the contract with the assured member. It is conceded that the certificate itself contains no provision for forfeiture on account of suicide, and at the time it was issued the articles of incorporation, edicts and by-laws of the association were silent as to that matter. Therefore the question should be ruled by Supreme Lodge K. of P. v. La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838, Supreme Lodge K. of P. v. Stein, 75 Miss. 107, 65 Am. St. Rep. 589, 21 South. 559, 37 L. R. A. 775, and other cases, where it was held that an anti-suicide clause was not binding upon a member of the order, when such provision had been adopted by a board of control only, and not by the supreme lodge, although such lodge had attempted to delegate that power to the board.

It is contended, however, that this rule amounts to a collateral attack upon the organization of the defendant, and a declaration that all of its acts, contracts and proceedings are void. We do not so understand the matter. It must be conceded that the defendant, by filing its articles of incorporation in compliance with the law in force at the time of its organization, acquired the right to carry on the business for which it was created. It must also be conceded that when the legislature passed the act of 1897 it became the duty of the defendant to so change the manner of selecting or choosing its officers as to comply with the terms of that act. It attempted to do so, and, while the change made was not sufficient to confer power to alter the insurance contract without the consent of the insured, yet it was and is a de facto organization, and its acts and doings in the ordinary conduct of its business are to be construed by the rules applicable to such a condition. This, however, does not prevent a member or a beneficiary from questioning the validity of any of its edicts or by-laws by which it is sought to vary or change the obligations of a contract which it has made with ²⁰⁰ him, or for his benefit. We have not overlooked the fact that counsel intimated on the hearing that the defendant was unable to comply with the present law requiring it to adopt a representative form of government. We are unable to seriously consider this suggestion. It is self-evident that the power which enabled the association to twice change the number and the manner of choosing the officers comprising its executive castle is sufficient, if properly exercised, to enable it to make such further changes in regard to that matter as will create for the association a representative form of government. Indeed, nothing can stand in the way of such action but a determination on the part of the members of the executive castle to perpetuate themselves in office, and assume permanent control over the business of the association, and we will not presume that they are or have been actuated by such motive.

For the foregoing reasons, our former opinion is right as to this point of the controversy, and should be adhered to.

2. We come now to consider the effect of the suicide of the assured member on the benefit certificate in question. It may be stated, at the outset, that to procure such a certificate with intent to commit suicide is a fraud on the association, and will defeat a recovery. In such a case the insurer would

have the option of rescission, with all of its incidents, even as against the beneficiary. But in this case it is not claimed that the record discloses any such intention on the part of the deceased member. Indeed, the effect of his conduct is to exclude that idea. It appears that he took out his certificate on the fourteenth day of August, 1897; paid all of his assessments for a period of nearly five years, and was a member of the association in good standing at the date of his death. So it seems clear that the contract in this case was entered into in good faith, and without fraud. Notwithstanding this fact, the defendant contends that suicide is a defense to this action even if the benefit certificate and by-laws of ²⁰¹ the association are silent on that subject. In support of this contention counsel cite *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 300, 42 L. ed. 693. In that case, however, the proof was plenary that the insurance was procured with the intent to commit suicide, but as the trial court had expressly charged the jury that in no case could there be a recovery if the assured had taken his own life designedly, while in sound mind, the question here at issue was necessarily involved in that decision. It was there held: "Intentional self-destruction, the assured being of sound mind, is in itself a defense to an action upon a life policy, even if such policy does not, in express words, declare that it shall be void in the event of self-destruction."

We find, on an examination of that opinion, that the reasoning of the learned judge who wrote it was to some extent based on the assumption that the experience tables used as a basis for fixing the consideration to be paid for such insurance exclude suicide as a cause of mortality, but we find it to be a fact, as shown by the authorities, and one which we have never heard questioned, that all of the mortality or experience tables used as a basis for computing premiums on life insurance, and assessments for carrying benefit certificates in fraternal benefit associations, include all forms of death, of which suicide is considered one: *Campbell v. Supreme Conclave I. O. H.*, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576. So self-destruction, although it may shorten the period of the life expectancy of the member, and thus decrease the amount which he may be expected to pay to the association, does not violate the terms of his contract, unless it is so expressly stipulated therein, because that contingency is included in, and is a part of, the consideration which supports such con-

tract. Suicide is only one of the many ways that may determine the event of death. Life insurance, of whatever kind and nature, is, in effect, an indemnity against the happening of that event, which is certain; and, insurance rates being based upon the average expectancy of life, as determined from experience tables, which include suicide as one of ²⁰² the causes of mortality, that contingency is considered a part of the contract, unless it is otherwise stipulated therein. As to the moral or ethical side of the discussion indulged in by Judge Harlan, we have to say that, while suicide was considered a crime at common law, yet we have no common-law crimes in this state; neither have we any statute making suicide, or an attempt to commit suicide, a crime. As to the matter of public policy, it may be said that suicide as a cause of death bears so small a percentage to the other causes of mortality, and is so infrequently committed, that insurance companies and mutual benefit associations should be permitted, at their option, to provide in their policies and benefit certificates that voluntary suicide will avoid the contract, or leave them silent on that subject. It is a custom, in this state at least, so well established as to become a matter of common knowledge that many life insurance companies and mutual benefit associations print their policies and certificates without the suicide clause, and, when selling insurance or soliciting membership, point to that fact as an evidence that their contracts are much more favorable and desirable than those which contain such a provision. Again, the trend of modern authority upon this question has led at least one state to enact a law providing that suicide shall not be a defense to a life insurance policy or a mutual benefit certificate, unless it was contemplated at the time the insurance was obtained; and that act has been upheld by the court of last resort of that state: *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557.

Our attention is also directed to *Shipman v. Protected Home Circle*, 175 N. Y. 498, 67 N. E. 1090. In that case the benefit certificate was silent on the subject of suicide, while sane, by a by-law, subsequently enacted, provided that the certificate should be void if the insured should die by suicide, sane or insane. No question was raised as to the power of the governing body of the association to adopt such a by-law, or its validity; and it was held to apply to a certificate in force at the time of the amendment, ²⁰³ because it.

was agreed therein that the member should comply with all the laws and regulations in force at the time he received the certificate, and all by-laws and regulations adopted thereafter. There is another case not called to our attention by counsel, to wit, *Hopkins v. Northwestern Life Assn.*, 94 Fed. 729, where the United States circuit court, being bound by the case of *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 300, 42 L. ed. 693, logically extended the bar against recovery to a policy taken out by the insured for the benefit of his wife. The judgment, however, in that case was affirmed (99 Fed. 199, 40 C. C. A. 1) upon other grounds. These appear to be the only authorities which support the defendant's contention. We have been unable to find any others, and if there are any, counsel have not called our attention to them. On the other hand, in the case of *Campbell v. Supreme Conclave I. O. H.*, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576, it was held that "suicide will not defeat recovery upon a contract of life insurance, not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms."

In *Patterson v. Natural Premium Mutual Life Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, 75 N. W. 980, 42 L. R. A. 253, it was held that intentional suicide, while sane, does not avoid a life insurance policy, in the absence of any provision therein to that effect, if third persons are beneficiaries, and, although suicide is technically a crime, it is not within the clause of an insurance policy providing that death in consequence of, or in violation of, law is not covered by the policy, where the usual suicide clause is omitted, and an absolutely incontestable clause included. An examination of the opinion, however, discloses the fact that the court declined to put its decision upon the incontestable cause and said: "Bearing these things in mind, and while conceding the strength of the arguments upon public policy on which the *Ritter* case is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence ²⁰⁴ in those decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect. Whether the rule would apply to a case where the personal representatives of the insured were

bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us. In so holding, it becomes unnecessary to consider the effect of the incontestable clause upon this branch of the case."

Indeed, we find the rule in most jurisdictions to be that suicide is not a defense to an action on a life insurance policy, or mutual benefit certificate, unless it is made so by the terms of the contract: *Kerr v. Minnesota M. B. Assn.*, 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312; *Horn v. Anglo-Australian and U. F. L. Ins. Co.*, 7 Jur., N. S., 673; *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389; *Northwestern Benevolent etc. Assn. v. Wanner*, 24 Ill. App. 357; *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162; *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557; *Knights Templar & M. L. I. Co. v. Berry*, 50 Fed. 511, 1 C. C. A. 561. Again, we find that this is not the first time this question has been before us. In *Supreme Lodge S. & D. P. v. Underwood*, 3 Neb. (Unof.) 798, 92 N. W. 1051, we held that "A certificate of membership, in favor of a person therein named as beneficiary, in a fraternal insurance company organized for the benefit of its members and beneficiaries, is not avoided by the suicide of the assured, in the absence of a provision in the contract of insurance to that effect."

So we are of opinion that we should decline to follow *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 300, 42 L. ed. 693; that we ought to place ourselves in line with the great weight of authority in this country, which leads us to the conclusion that the defense of suicide in this case cannot be maintained.

For the foregoing reasons, our former judgment is adhered to.

Judgment accordingly.

²⁰⁵ SEDGWICK, C. J. I concur in the conclusions reached upon both points discussed in the opinion, but do not concur in the language used in the criticism of the reasoning of the supreme court of the United States in *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 300, 42 L. ed. 693.

The Effect of Changes in the By-laws of Beneficial Associations as against pre-existing members is discussed in the note to Strauss v. Mutual Reserve etc. Assn., 83 Am. St. Rep. 706. The general rule is, that members of an association who have stipulated in their contract of membership to comply with the laws of the society then in

force, or thereafter adopted, are bound by subsequent reasonable amendments to a by-law in force when they became members. However, the power reserved by an association to make changes in its by-laws warrants only reasonable variances in its contracts with members, and not such as are destructive of vested rights. This rule applies to the adoption of nonsuicide provisions: *Olson v. Court of Honor*, 100 Minn. 117, 117 Am. St. Rep. 676; *Gilmore v. Knights of Columbus*, 77 Conn. 58, 107 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

Suicide as a Defense to an Action on a Policy of life insurance is the subject of a note to Supreme Conclave v. Miles, 84 Am. St. Rep. 539.

POWERS v. STATE.

[75 Neb. 226, 106 N. W. 332.]

CRIMINAL LAW—Refusal to Testify as Evidence of Guilt—Misconduct of Counsel.—The refusal of a witness to testify, because such testimony might be used in a criminal prosecution against him or her, or because it would subject him or her to humiliation and disgrace, is not a fact or circumstance which may be considered as tending to prove the guilt of the defendant on trial, and the statement of the prosecuting attorney in his argument to the jury that such refusal to testify is evidence of such guilt is prejudicial and reversible error. (p. 803.)

TRIAL—Misconduct of Counsel.—If the appellate court is satisfied that prejudice to the defendant resulted from misconduct of counsel in the argument of the case, it constitutes reversible error. (p. 804.)

CRIMINAL LAW—Admissions as Evidence of Guilt.—If admissions of his guilt are made by an accused under such circumstances of apparent peril and bodily danger as to make them inadmissible in evidence, declarations of witnesses made to the defendant at a later date to the effect that he did make such admissions cannot be used as evidence against him. (p. 805.)

CRIMINAL LAW—Trial—Presence of Judge.—In criminal cases the trial judge must be present in the courtroom during the whole trial, and if he absents himself without the consent of the defendant, it is error, which may call for a reversal of the case. (pp. 805, 806.)

Stark & Grosvenor, for the plaintiff in error.

N. Brown, attorney general, W. T. Thompson and M. F. Stanley, for the defendant in error.

227 DUFFIE, C. An information was filed against the plaintiff in error charging him with adultery with one Maud Cattron, the wife of William Cattron, who was the complaining witness in this case. On the trial Maud Cattron was called as a witness by the state. Being examined by the

county attorney, she stated that she was the wife of William Cattron, the complaining witness, and had been acquainted with the defendant for about seven years. She further testified that she had seen the defendant on the 18th of May, 1904, both at her own house and at her husband's livery barn. She was then asked to state to the jury what took place between Mr. Powers and herself on or about the 18th ²²⁸ of May, 1904, and replied that she did not care to answer, and claimed her privilege not to testify. Her claim of privilege was sustained by the court, and she was dismissed from the stand. In his argument to the jury the county attorney called attention to the refusal of Mrs. Cattron to testify, in the following language: "I call your attention to the witness that comes on the witness-stand and hides behind her constitutional privileges and exemptions. You would be justified as taking that as a confession of her guilt." Exceptions were immediately taken to this line of argument by the attorneys for defendant, but the presiding judge being absent in his private room preparing his instructions to the jury, no immediate ruling of the court could be had until the reporter informed the judge that objection was being taken to the line of argument pursued by the county attorney, whereupon he immediately returned to the bench, when that part of the argument objected to was stated in his presence by counsel for the defendant, and the court thereupon stated to the county attorney that he should desist from pursuing that line of argument, and he orally charged the jury that they should pay no attention to the fact that the witness, Maud Cattron, had claimed her constitutional and statutory right to refuse to testify, or the reference to such fact made by the county attorney, and that such failure on her part to testify should not be taken against the defendant.

The facts above stated are shown by an affidavit filed by the defendants in support of his motion for a new trial, as well also as a record entry made and certified by the trial judge and attached to the bill of exceptions. The defendant's affidavit is not included in the bill of exceptions, and it is objected that this court cannot reconsider it, or the facts therein recited, for that reason. This is undoubtedly the general rule, but the record in this case contains the certificate of the trial judge referring to and identifying the defendant's affidavit, and clearly, as we think, makes it as much a part of the record in the case as his own statement.

In his certificate the trial judge does not recite the facts ²²⁹ stated in the affidavit, but refers this court to the affidavit itself for the facts set forth, and we think it would be a grave injustice to the defendant to ignore, upon technical grounds, an affidavit called to our attention by the trial judge. What inference, if any, might the jury draw from the refusal of Mrs. Catron to testify relating to her relations with the defendant? If the jury were warranted in drawing the inference that she was guilty of adultery with the defendant, that, of course, would go to establish his guilt, and counsel for the state might properly refer in argument to any circumstances surrounding the case from which the jury might infer the guilt of the party on trial. This is one view of the case. Another, and we think a better, view is that the refusal of a witness to testify, because such testimony might be used in a criminal prosecution against him or because it would subject him to humiliation and disgrace, is not a fact or circumstance which may be considered as tending to prove the guilt of the defendant on trial. The law is plain that a witness need not give testimony which would tend in any degree to prove him guilty of a criminal offense or which would subject him to humiliation and disgrace. The exercise of this privilege on his part cannot, we think, in any legitimate degree be considered as tending to prove the guilt of the party on trial. Let us see what the result of any other rule would be. Two parties, man and wife, seek to establish the charge of adultery with the wife against another. The wife is put upon the stand to prove the charge. She is told of the privilege which the law extends to her of refusing to testify. She claims that privilege, knowing well that she could not truthfully testify to the guilt of the defendant. Can it be said that the law would sanction in this way the conviction of a man, not upon statements of fact testified to by a witness, but upon the refusal of the witness to state any facts? The law will not be so unjust as to impute guilt to one upon trial because a witness called by the state refuses to give evidence upon a question which might or might not be used against him. We think that no inference against the innocence ²³⁰ of the defendant could be drawn, or should be allowed, from the refusal of Mrs. Catron to testify upon the question of the relations existing between them. This being the case, that circumstance should not have been referred to by the

county attorney in his argument; and the only question remaining is, Did the admonition of the judge and his instructions to the jury to disregard the argument, and not to allow the refusal of Mrs. Cattron to testify to influence them against the defendant, cure the error? The general rule appears to be that, unless the appellate court is satisfied that prejudice to the defendant resulted from misconduct of counsel in the argument of the case, it does not constitute reversible error: See extended note to *People v. Fielding*, 158 N. Y. 542, 70 Am. St. Rep. 495, 53 N. E. 497, 46 L. R. A. 641.

In the present case the testimony tending to show the guilt of the defendant is not of a satisfactory character. The husband of Mrs. Cattron, it is true, testifies that on the night of the 18th of May, 1904, he was aroused from his sleep about 11 o'clock, and went to the rear of his house and looked out through a glass door in the kitchen, and saw the defendant and his wife in the act of sexual intercourse. He immediately returned and went back to bed. He said nothing of it to anyone. He made no complaint. There were trees and shrubbery in his back yard. There were no lights nearer than about sixty feet from where he claims to have seen the parties. The jury might well have doubted his ability to recognize them, and doubted his unusual and unnatural conduct if he did—conduct that cannot be understood or explained in the ordinary man. A week or ten days after this, Cattron and the defendant had some trouble in Cattron's livery barn growing out of the claimed intimacy between the defendant and Mrs. Cattron. Two witnesses were called by the state to prove admissions made by the defendant during and shortly after that trouble, but the court ruled out these admissions, upon the ground that serious threats had been made against the defendant and that his statements were made under such circumstances as to annul their force as evidence. Two of these witnesses ²³¹ testified upon the preliminary hearing, giving the defendant's admissions as they understood them on that trial. Shortly before his trial in the district court the defendant had a conversation with these witnesses relating to their testimony on his preliminary examination, in which he claimed that they were mistaken in the statements made by him, and in which they asserted that they were not mistaken, that their testimony to the effect that he had admitted being sexually intimate with Mrs. Cattron was true. The court allowed these later conversations

to be given to the jury. If, as held by the trial court, the defendant's statements relating to his intimacy with Mrs. Cattron, made on the 25th of May, 1904, were made under such circumstances of apparent peril and bodily danger as to make them inadmissible, it is quite evident that declarations of the witnesses made to the defendant at a later date, to the effect that he did make such admissions, ought not to be used against him. But a more serious objection than this exists. This admission, claimed to have been made by the defendant, was not testified under oath by the witnesses. They testified only that, in a talk they had with the defendant at a time when they were not under oath, they told him he admitted that he had been criminally intimate with the woman. This is not sworn testimony and cannot be used to support a verdict. The testimony of the husband and of these two witnesses in this later conversation, to which we have referred, is the only evidence of guilt upon which the verdict rests, and we incline to the belief that the jury must have been largely influenced by their attention being called to the refusal of Mrs. Cattron to testify, and the argument of the county attorney based thereon that this should be taken as a confession of her guilt.

We think, also, that this case comes within the rule adopted in *Palin v. State*, 38 Neb. 862, 57 N. W. 743. In that case, as in this, the trial judge was absent from the courtroom when the statements objected to took place, but immediately returned to the bench and admonished the attorney to keep within the record, and the attorney himself stated to the ²³² jury that, if he was mistaken, he desired that they should pay no attention to his statements. Under these facts it was said: "Considerable latitude should always be allowed counsel in the discussion of facts before the jury; but an attorney, and especially a prosecutor in a criminal trial, has no right in arguing a case to state as a fact any matter not borne out by the testimony. The argument in this case was clearly beyond legitimate bounds, and was highly prejudicial to the accused. The trial judge likewise erred in permitting the argument to be made while he was absent from the courtroom."

It often occurs that the trial judge, by consent of the parties, retires to his private room during argument of counsel to prepare his instructions. In such case it would undoubtedly be held that the parties have waived his presence,

and that his absence from the courtroom during the argument, under such circumstances, would not be reversible error; but we think the better rule, especially in criminal cases, is for the judge to be present during the whole trial, and that, if he absents himself without the consent of the defendant on trial, it is error which may call for a reversal of the case.

Upon these grounds, we base our decision that the judgment should be reversed and the cause remanded for another trial.

Albert and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for another trial.

**CAN REFUSAL OF A WITNESS TO TESTIFY BE REFERRED TO
IN THE ARGUMENT AS EVIDENCE OF DEFENDANT'S
GUILT.**

I. Introductory, 806.

II. General Principles Controlling, 807.

III. Illustrations.

a. When Witness Refused to Testify, 809.

b. By Way of Analogy, 811.

I. Introductory.

The frequent occasions on which verdicts of conviction in criminal cases have been set aside because the jury were prejudiced by argument of the state's attorney which was not justified by the evidence leads us to observe that some of these officers seem to often overlook the true intent of the law with respect to the duties they are expected to perform. The state, of course, not only desires that no innocent citizen should be convicted, but prefers that one accused of crime may be able to establish his innocence and his right to good citizenship. To give him this opportunity the law wisely provides that his trial shall be free from prejudice of every kind. The judge before whom he is tried must be perfectly fair and impartial. Moreover, when one is charged with the commission of a crime, he must be convicted, if at all, according to certain well-defined methods of procedure, which the law in its wisdom and experience has adopted. The state also desires that the attorney who represents it in the prosecution should be as fair and impartial as the judge, for while it is his duty to present all the evidence against the accused and to use every legitimate means to secure a conviction when the evidence warrants it, it is equally his duty, as the representative of the state, to protect from punishment one whose guilt cannot be established under the

rules of procedure which the law has laid down. This duty is not performed if the minds of the jury are prejudiced by an argument which seeks to inject into the case facts not proven by the testimony, or inferences to be drawn from such unproven facts. In *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719, it is said: "Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust." And again, in *Hamilton v. State*, 97 Tenn. 452, 37 S. W. 194, Judge Wilkes, in condemning an argument of the prosecuting attorney which commented on facts not disclosed by the evidence, said: "The district attorney has no right to make statements in argument based upon his own knowledge or upon anything else not contained in the record. He should be as vigilant to see the prisoner protected from such statements as he is to see that the state is protected by an actual presentation of the evidence as it is in the record. He should treat all prisoners as the law regards them—as innocent citizens—until the contrary is shown; and while on trial the prisoner is entitled to respectful treatment, and should neither be prejudiced by statements of fact not in evidence, nor by an insulting manner when he is powerless to protect himself." A further illustration of the high ideal which the state would have its public prosecutors observe with reference to perfect impartiality is shown in *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229, where a case was reversed because the district attorney sought to cause the jury to assume damaging facts against the prisoner, by asking questions of a witness which he knew could not be answered because the testimony desired would be inadmissible.

But three cases have come under our observation where the precise point indicated by the subject of this note was under review, but from the conclusions reached in these cases and the language used in other cases clearly analogous, it is plain to see that the rule adopted in these cases is based on the general principle which governs when an attorney oversteps the privilege which he is allowed in the argument. In addition to giving the general principles which control, we will show, by illustration, how these principles have been applied both when the precise point under consideration was involved and when by analogy their application is apparent. For a general discussion of the misconduct of counsel in their argument, see the monographic note to *McDonald v. People*, 9 Am. St. Rep. 595.

II. General Principles Controlling.

As a general rule, counsel are allowed considerable latitude in their arguments, and in the very nature of things it is difficult to formulate set rules by which to determine when statements of counsel are so improper as to require reversal of a judgment of conviction. For

this reason the matter is left largely in the discretion of the trial judge. But this discretion is a judicial one, and it is undoubtedly true, as a general proposition, that, whenever it appears that one accused of crime has been prejudiced by counsel attempting by their argument to place unsworn evidence before the jury by stating as facts things not proven by the evidence, or seeking to have the jury draw unwarranted conclusions from the facts not in evidence, the courts of final resort will not hesitate to grant a new trial. This general doctrine can best be understood by the language of the courts themselves.

“A bridle should be put upon the tongue of an attorney promptly and firmly by the court, and upon its own motion, whenever he makes the first break across the record boundry. . . . If zealous counsel cannot find sweep for their genius or eloquence within the record, they should not be permitted to enjoy that privilege to the prejudice of the right of the opposite party”: *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

In *Bessette v. State*, 101 Ind. 85, it was said by the court: “It may sometimes happen—as, for aught we know, was the case in this instance—that in his zeal to do his duty the bounds of propriety may be unwittingly overstepped by an inexperienced prosecutor, and, while it would be a most ungracious task for the court to say anything which would in any degree suppress the highest enthusiasm of forensic effort in behalf of the state, or in any case at the bar, it should be remembered that fair, open debate, rather than a resort to questionable expedients, will best subserve the ends of justice. To arrive at the exact truth and justice of the case according to the facts and the law should be the aim of all forensic strife.”

In *State v. Comstock*, 20 Kan. 650, it was said: “Courts ought to confine counsel strictly within the facts of the case; and if counsel persistently go outside of the facts of the case in their argument to the jury, then the court should punish them by fine and imprisonment; and if they should obtain verdict by this means, then the court should set such verdicts aside.”

And the fact that the prosecutor believes the accused is guilty should not influence the court in relaxing the rule, neither should the fact that evidence of guilt is hard to obtain, for it is said in *People v. Aiken*, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821: “There can be nothing gained in the end by an overzealous and unfair perversion of facts in order to convict an accused person of a crime of which the prosecutor may have good reason to believe him guilty, and which, as in this case, may be hard to establish by the ordinary and established methods of procedure. While the zeal of the prosecutor may be well excused, and the hot and bitter language that comes from the heart, involuntarily, of one who is thoroughly impressed with the heinousness of the crime and the guilt of the respondent, is to be expected in such cases, it is nevertheless the duty of the court

sitting impartially between the people and the prisoner to check and control any intemperance of zeal or language that is not warranted by the facts and circumstances shown by the proofs. If this is not done the final court of review, removed entirely from the passion and prejudice that generally surround the trial in the lower courts of cases of this nature, will see to it that the injustice is corrected and a new trial granted.”

In *State v. Tuten*, 131 N. C. 701, 42 S. E. 443, Judge Douglass, in commenting upon an unwarranted conclusion drawn by the prosecutor in his argument, said: “It is urged that the jury were too intelligent to be prejudiced by such remark. This may be true, and yet it does not affect the spirit of the law, which seeks by well-established rules to prevent the possibility of prejudice. An opposite course would do away with the entire law of evidence and permit the introduction of all testimony of every kind and description, competent or incompetent, relevant or irrelevant, that either side may see fit to offer. In all such cases the intelligence of the jury must be guided by the wisdom and experience of the law.”

In *Bryson v. State*, 20 Tex. App. 566, the court declares: “That no remarks should be made by counsel for the state which are not fully warranted by the evidence. Matters not in evidence should not be alluded to in argument, when such matters might possibly prejudice defendant.” Views similar to the above have been often expressed by the courts: *Cross v. State*, 68 Ala. 476; *Pruitt v. State*, 92 Ala. 41, 9 South. 406; *Dunmore v. State*, 115 Ala. 69, 22 South. 541; *People v. Mitchell*, 62 Cal. 480; *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267, 18 South. 182; *Berry v. State*, 10 Ga. 511; *Davis v. State*, 138 Ind. 11, 37 N. E. 397; *Palin v. State*, 38 Neb. 862, 57 N. W. 743; *State v. Hatcher*, 29 Or. 309, 44 Pac. 584; *Turner v. State*, 4 Lea (Tenn.), 206.

III. Illustrations.

a. **When Witness Refused to Testify.**—In *Powers v. State*, 75 Neb. 226, ante, p. 801, 106 N. W. 332, defendant was on trial for adultery. Mrs. Cattron, the woman with whom he was charged to have committed the offense, claimed her constitutional privilege and refused to testify against him. In his argument the prosecuting attorney commented on the refusal of the woman to testify as a confession of her guilt and therefore proof of defendant's guilt. Said the court: “What inference, if any, might the jury draw from the refusal of Mrs. Cattron to testify relating to her relations with the defendant? If the jury were warranted in drawing the inference that she was guilty of adultery with the defendant, that, of course, would go to establish his guilt, and counsel for the state might properly refer in the argument to any circumstance surrounding the case from which the jury might infer the guilt of the party on trial. This is one view of the case. Another and we think a better view is that the refusal of a witness to testify because such testimony might be

used in a criminal prosecution against him, or because it would subject him to humiliation and disgrace, is not a fact or circumstance which may be considered as tending to prove the guilt of the defendant on trial. The law is plain that a witness need not give testimony which would tend in any degree to prove himself guilty of a criminal offense, or which would subject him to humiliation and disgrace. The exercise of this privilege on his part cannot, we think, in any legitimate degree be considered as tending to prove the guilt of the party on trial. Let us see what the result of any other rule would be. Two parties, man and wife, seek to establish the charge of adultery with his wife against another. The wife is put upon the stand to prove the charge. She is told of the privilege which the law extends to her of refusing to testify. She claims that privilege, knowing well that she could not truthfully testify to the guilt of the defendant. Can it be said that the law would sanction in this way the conviction of a man, not upon statements of fact testified to by a witness, but upon the refusal of a witness to state any facts? The law will not be so unjust as to impute guilt to one upon trial because a witness called by the state refuses to give evidence upon a question which might or might not be used against him. We think that no inference against the innocence of the defendant could be drawn or should be allowed, from the refusal of Mrs. Catron to testify upon the question of the relations existing between them. This being the case, that circumstance should not have been referred to by the county attorney in his argument."

In *State v. Harper*, 33 Or. 524, 55 Pac. 1075, the defendant was on trial for larceny. One Underhill, who had previously been convicted of the same theft, was called as a witness, but refused to testify, and persisted in this refusal though he was instructed that by reason of his previous conviction, his testimony would not subject him to further penalty. The state's attorney contended in his argument that Underhill's refusal to testify established the defendant's guilt. It was held that in the absence of any agreement being shown between the defendant and the witness, whereby the latter was to refuse to testify, that the argument of the state's attorney was not justified, and a new trial would be granted.

The only other case we have discovered where the exact question involved was in issue is that of *Beach v. United States*, 46 Fed. 754. In this case Justice Field, in commenting upon the action of the district court in permitting the district attorney to argue to the jury that a witness' refusal to answer certain questions was a circumstance to be considered by them as tending to establish the defendant's guilt, said: "We are clear that the court below erred in allowing the district attorney to argue to the jury that the refusal of Marks to answer certain questions on the ground that his answers might criminate himself was a circumstance to be considered by them in making up their verdict; that they had a right to consider

whether it was not his real object to protect the defendant, and not himself; and that 'if he was thus particular to protect the defendant,' it must have been from a knowledge that his answers might criminate, not himself, but the defendant. . . . The refusal of the witness to answer the questions, if he thought his answers would criminate himself, was his constitutional right, which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been the effect of his testimony, had it been given, was unwarranted. The intimation even that any such inference was justifiable . . . was calculated to work injustice to the defendant, and to lead the jury to yield to suggestions and suppositions rather than to the actual evidence in the case. It would, indeed, be strange doctrine, that anyone could be found guilty, or even that his guilt could be seriously debated, because another party, called as a witness who had no relations and was not a conspirator with him, or charged in the same indictment, had refused to testify in order to protect himself. There is neither reason nor authority for any such doctrine."

It is plain to see from the three cases last quoted that the argument was condemned, not so much because of the fact that counsel commented on evidence that had not been given, but because the inference he sought to draw as to what the evidence would have been, if the witness had not refused to testify, was not warranted. But in *Davis v. State*, 138 Ind. 11, 37 N. E. 397, the broad doctrine is announced that "it is the business of an attorney to comment on the evidence that has been given, not upon that which might have been given," and we see no reason why this rule which is so generally supported should not apply to comments on evidence which was not given because of refusal of a witness to testify.

b. *By Way of Analogy.*—In *Berry v. State*, 10 Ga. 511, the state's attorney requested the jury to suppose the existence of certain facts of which there had been no proof. Speaking for the court, the distinguished judge, Lumpkin, said: "For counsel to undertake by a side wind, to get that in as proof which is mere conjecture, and thus work a prejudice in the minds of a jury, cannot be tolerated. . . . I would be the last man living to seek to abridge freedom of speech, and no one witnesses with more unfeigned pride and pleasure than myself the effusions of forensic eloquence daily exhibited in our courts of justice. For the display of intellectual power, our bar speeches are equaled by few, surpassed by none. Why, then, resort to such a subterfuge? Does not history, ancient and modern—nature, art, science, and philosophy—the moral, political financial, commercial and legal—all open to counsel their rich and inexhaustible

treasures for illustration? Here, under the fullest inspiration of excited genius, they may give vent to their glowing conceptions, in thoughts that breathe and words that burn. Nay, more, giving reins to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time—*extra flammantia moenia mundi*. But let nothing tempt them to pervert the testimony, or surreptitiously array before the jury facts which, whether true or not, have not been proven.”

It seems to us that the contention of an attorney in his argument that the refusal of a witness to testify establishes the guilt of another party is necessarily based on supposition as to what the witness evidence would be had he not refused to testify, and therefore that in such cases the language just quoted from one of the most erudite scholars and profound jurists that ever graced the bench is clearly applicable.

In *State v. Hatcher*, 29 Or. 309, 44 Pac. 584, defendant was on trial for manslaughter. His attorney contended that the homicide was committed while an attempt was being made to commit a forcible felony on defendant's wife. Under the law of Oregon, the defendant's wife could not be forced to testify, and there was no proof that she had consented to testify. The state's attorney in the argument to the jury referred to the fact that the state could not call defendant's wife as a witness, but that had she testified her evidence would have been adverse to the defendant, or he would have called her himself. In holding that such argument necessitated a reversal of the judgment, the court said: “If no presumption of the defendant's guilt can be invoked by reason of his failure to testify in his own behalf, how can such a presumption be created by his failure to produce his wife as a witness when she cannot be compelled to testify without her consent? If the defendant in a criminal action, by becoming a witness in his own behalf, thereby consents to his wife's testimony, and is obliged to produce her to rebut an alleged presumption of his guilt, what an anomalous position he would be placed in if, after having called her as a witness, she should refuse to testify for him. Her refusal in such case would doubtless be construed by the jury as evidence of her knowledge of his guilt, when, perhaps, her real motive for refusing to testify was to secure his conviction for a felony for a selfish purpose, and thus make her silence serve the purpose of the incriminating evidence, which she is prohibited by statute from giving.”

In *State v. Millmeier*, 102 Iowa, 692, 72 N. W. 275, it is held that where a husband on trial for arson and who claimed to have been at home on the night of the burning, failed to call his wife as a witness (she being within reach of the process of the court), that the state's attorney was justified in alluding in his argument to such failure, and that the state could not call her; and to the same effect is *Mercer v. State*, 17 Tex. 452.

And in a California case decided last year, *People v. Ye Foo*, 4 Cal. App. 730, 19 Pac. 450, it is held that reference by the prosecuting attorney that the defendant had failed to call one who was jointly indicted was not error when such codefendant was within process of the court. Said the court, however: "If such codefendant should be called, and should refuse to testify on the ground that his evidence might tend to incriminate himself, that would present a different question." We are left to infer what ruling would have been made on the "different question," as that was not decided.

GOBLE v. BRENNEMAN.

[75 Neb. 309, 106 N. W. 440.]

HOMESTEADS—Liens.—If a mortgage lien existing on a homestead is extinguished by the proceeds of a loan secured by a new mortgage on the same land, and the interest of the homestead claimant at no time exceeds the statutory amount in value, and the land while thus mortgaged is sold to a third person, who occupies it as a homestead, a judgment filed while the first mortgage was in force does not become a lien upon the land superior to the new mortgage. (p. 814.)

PROCESS—Return—Impeachment.—The return of an officer as to service of process may be impeached by extrinsic evidence. (p. 815.)

J. W. James, for the appellant.

J. M. Ragan, for the appellee.

309 LETTON, C. Two judgments were rendered in justice's court in Adams county, in January, 1896, against M. V. Brenneman and Ida Brenneman, his wife, transcripts of which were at once filed in the office of the clerk of the district court for that county for the purpose of procuring a lien upon the real estate of the defendants. Executions were issued soon after the rendition of the judgments and filing of the transcripts and returned nulla bona. The defendants occupied certain real estate as a homestead, which was of the value of three thousand one hundred dollars, and was encumbered by a mortgage to the Eastern Banking Company in the sum of fourteen hundred dollars. On the first day of April, 1899, the Brennemens borrowed from the Nebraska Loan and Trust Company the sum of fifteen hundred and fifty dollars for the purpose of paying the debt to the East-

ern Banking Company, which was done, and the first mortgage released on the 10th of April, 1899. ³¹⁰ On the same day the property was sold to the defendant, Mike Flessner, who has ever since occupied the same as his homestead. On April 23, 1899, executions were again issued upon the judgments and were levied upon the real estate. This action was then begun by the judgment creditor for the purpose of declaring the judgments to be a lien upon the real estate, subject only to a homestead right of two thousand dollars in value. The answer sets up that the premises were the homestead of the Brennemens and of less value than two thousand dollars at the time of the sale to Flessner, and consequently were and are exempt. Mrs. Brenneman further alleges that the real estate was her own separate property and homestead until she sold the same to Flessner. She denies that she ever executed the notes sued upon, avers that no summons was ever served upon her in the actions on the notes, and denies that she was ever indebted to plaintiff, or that he has or ever had a judgment against her. By way of cross-petition, she alleges the same facts and asks that the cloud created by the transcripts upon her real estate be removed. The court found that the judgments are not liens upon the real estate, and are void as to the defendant Ida Brenneman.

1. Upon the question of the homestead character of the real estate, and whether or not the judgments are liens upon the same, this case is governed by the case of *France v. Hohnbaum*, 73 Neb. 70, 102 N. W. 75, 104 N. W. 865. Under the doctrine of this case, the property was exempt.

2. As to the defense of Ida Brenneman against the judgments, Brenneman testifies that her name was written upon the notes by him when she was not present, and without authorization. He also testifies that the summonses for his wife in the two cases were served upon him by John Patterson, the constable; that at that time he was in the country near his house, and his wife was in Hastings; that the constable gave both summonses to him and told him to give them to his wife; that he did not give them to her, nor tell her anything about it, and that his wife knew ³¹¹ nothing about his having given the notes, or the suit having been brought. Mrs. Brenneman testified that she never signed the notes, never saw either summons, and never knew of the suit before the justice. The deposition of the constable is in the

record. He testifies that he left the summonses for Mrs. Brenneman with her husband, who said he would give them to her, as she was not at home; that he did not see Mrs. Brenneman nor leave a copy for her at her place of residence, and never gave her any copies of the summonses at any time or place. The return on the summonses is to the effect that he made service "by delivering to each of said defendants a certified copy of this summons, and of the indorsements thereon, at their residence." The justice's docket shows that at the trial the defendant M. E. Brenneman was present, but that Ida Brenneman made default. The evidence is clear that Mrs. Brenneman never signed the notes, was never served with a copy of a summons and had no notice or knowledge of the actions. It is the rule in this state that the return of an officer as to service of process may be impeached by extrinsic evidence: *Walker v. Lutz*, 14 Neb. 274, 15 N. W. 352; *Wilson v. Shipman*, 34 Neb. 573, 33 Am. St. Rep. 660, 52 N. W. 576; *Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co.*, 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774.

The evidence in this case is strong enough to do so successfully, and the judgment of the district court should be affirmed.

Ames and Oldham, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.

A Judgment on a Debt created since the recording of a homestead is not a lien thereon: *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567; *Upton v. Coxen*, 60 Kan. 1, 72 Am. St. Rep. 341; *Wilhelm v. Locklar*, 46 Fla. 575, 110 Am. St. Rep. 111. If the owners of a homestead sell it and receive and use the purchase money and subsequently purchase another homestead with other funds, the latter is not subject to sale under execution to satisfy a judgment which existed against them prior to the sale of the first homestead: *McConnell v. Wolcott*, 70 Kan. 375, 109 Am. St. Rep. 454.

Claims for Which Homesteads are Liable are considered in the note to *Mertz v. Berry*, 45 Am. St. Rep. 383.

CITY OF LINCOLN v. LINCOLN STREET RAILWAY COMPANY.

[75 Neb. 523, 106 N. W. 317.]

APPELLATE PRACTICE—Continuance—Discretion of Court.

An application for a continuance of a case is addressed to the sound legal discretion of the trial court, and unless it appears that there has been an abuse of such discretion, the ruling on that question will be affirmed. (p. 817.)

MORTGAGES—Foreclosure—Rents and Profits.—A purchaser at foreclosure sale acquires by his deed all of the interest of the mortgagor in the mortgaged property, and the grantee of such purchaser in possession of the premises as owner in fee is not liable to a junior encumbrancer for rents and profits when such encumbrancer does not seek to redeem. (pp. 818, 819.)

MORTGAGES—Foreclosure—Description of Property.—A description of property in a decree of foreclosure as "the power-house on Ninth street," if the identity of the property can be readily ascertained by parol evidence, is a sufficient description to sustain the decree. (p. 820.)

TAX SALES—Redemption.—A constitutional provision granting to the owner of real estate sold for the nonpayment of taxes, or special assessments of any character whatever, the right of redemption for a period of two years from the date of sale, is self-executing, and a junior lienholder is not entitled to a decree ordering the sale of such real estate, without the right of redemption. (p. 820.)

JUDGMENTS—Res Judicata.—An action cannot be maintained to set aside or vacate a decree of foreclosure based on a prayer for relief at the trial which resulted in such decree. (p. 821.)

E. C. Strode and D. J. Flaherty, for the appellant.

Clark & Allen, for the appellee.

523 BARNES, J. This proceeding was instituted by the city of Lincoln to vacate or modify a decree of foreclosure of the district **524** court for Lancaster county rendered March 12, 1902. The original action was instituted to foreclose a lien for paving assessments, and on appeal the decree therein was affirmed by this court: *City of Lincoln v. Lincoln Street R. Co.*, 67 Neb. 469, 93 N. W. 766. The application was dismissed on its merits, and the city appeals. The propositions contended for by the appellant will be taken up and disposed of in the order of their presentation.

1. It is alleged in the petition that the decree of March 12, 1902, was based on a stipulation of facts which was not the stipulation made by the parties, nor was it a true or correct copy thereof. This allegation was made the basis of a prayer to vacate and set aside the decree. It is strenu-

ously insisted that the district court erred in overruling the appellant's application for a continuance to obtain testimony to support that allegation. An application for a continuance is addressed to the sound legal discretion of the trial court, and, unless it clearly appears that there has been an abuse of such discretion, the ruling on that question will be affirmed: *Burris v. Court*, 48 Neb. 179, 66 N. W. 1131.

It appears from the record that this proceeding was commenced on the second day of April, 1904; that on the first day of the January term, 1905, the court assigned it for trial on the thirteenth day of February, following; that thereafter, and seven days before the day fixed for the trial, the appellant, by leave of the court, amended its petition, and the defendant, the Lincoln Traction Company, immediately filed its answer thereto; that on the day of trial appellant filed its motion for a continuance, supported by certain affidavits of counsel, in which it was stated, in substance, that the stipulation on which the decree complained of was rendered was not, as they were informed and believed, the stipulation of facts as made by the parties, nor was it a correct copy thereof; that the stipulation contained many erasures and interlineations; that they were informed and believed that the stipulation actually made between the parties was a clean copy without any such interlineations and erasures; that they desired the continuance ⁵²⁵ to obtain the testimony of N. C. Abbott and J. R. Webster, former city attorneys of the city of Lincoln, to establish that fact; that paragraphs 15 and 16 of the stipulation fixed the date when the bonds secured by the New York Security and Trust Company's mortgage were executed, and the statement contained therein was untrue. It was also stated in the affidavits that these facts were not known to counsel until about ten days before the date fixed for the trial of the cause. The affidavits do not show any diligence on the part of the city or its attorneys; the statements contained therein are not positive, but are of such an equivocal character as to afford no basis for a prosecution for perjury, if untrue. It is admitted that the signatures appended to the stipulation are the genuine signatures of the former city attorneys, and that document was used by the present city attorneys on the trial, which resulted in the decree of March 12, 1902; so counsel must have known of its condition as early as that date.

That such a showing was not sufficient to require the trial court to grant a continuance is apparent, and his ruling on that point should be affirmed.

2. The city next contends that it was entitled to an accounting. The basis of that claim is that the city with its third lien is in the position of a junior mortgagee; that it was not made a party to the foreclosure proceedings in the federal court, under which the title of the traction company to the street railway property was obtained, and its rights were not affected by that decree; that the traction company has only the rights of a senior mortgagee in possession, and must account for the rents and profits of the property. It is contended that this is not the proper proceeding in which to determine that question, because the power of the district court to vacate or modify its own judgments is limited to the grounds enumerated in section 602 of the code. It is unnecessary to discuss that question, because the application must be denied on its merits. It is true that counsel for the city cite a number of cases, some of which appear, at first blush, to sustain ⁵²⁸ their contention, but a careful examination discloses that they do not apply to the facts here under consideration. The petition discloses that certain persons purchased the street railway property at a judicial sale, under a decree of foreclosure rendered by the federal court, which was in all respects legal and valid, that they received a deed therefor, and thereafter conveyed the property in fee to the Lincoln Traction Company, which went into possession thereof as owner; that the city was not made a party to the proceeding, and its rights were not affected thereby. So it may be said that the city as a junior lienholder has a right to redeem the prior encumbrances, and may do so by paying the amount of prior liens, with interest and cost. But the city does not ask or offer to redeem in this proceeding. The right of an accounting is an incident to an action to redeem. Pomeroy, speaking of that matter says: "This accounting belongs exclusively to the equitable jurisdiction, and can be enforced only in a suit to redeem, brought by the mortgagor or subsequent encumbrancer": 3 Pomeroy's Equity Jurisprudence, 3d ed., sec. 1218. And that is the rule adopted by this court. In *Renard v. Brown*, 7 Neb. 449, the same situation was presented as in this case. A senior mortgage was foreclosed without making a junior encumbrancer a party to the fore-

closure suit. The senior mortgagee purchased the property and went into possession; subsequently the junior mortgagee sought to compel him to account for the rents and profits and apply them on the senior lien. On this state of facts it was said: "After a sale has been made and confirmed and a deed executed and delivered to the purchaser, he takes all the interest of the mortgagor in the property. Our statute provides that such deed 'shall vest in the purchaser the same estate that would have vested in the mortgagees if the equity of redemption had been foreclosed, and no other or greater; and such deeds shall be as valid as if executed by the mortgagor or mortgagee, and shall be an entire bar against each of them and all parties to the suit in which ⁵²⁷ the decree for such sale was made, and against the heirs respectively and all persons claiming under such heirs.' In this case the plaintiff was not in possession of the premises as mortgagee, but as owner of the fee, and as such is not liable to account to a junior mortgagee."

This rule was approved and followed in *Higginbottom v. Benson*, 24 Neb. 461, 8 Am. St. Rep. 211, 39 N. W. 418, *Huston v. Canfield*, 57 Neb. 345, 77 N. W. 763, *Orr v. Broad*, 52 Neb. 490, 72 N. W. 850, and *Clark v. Missouri, K. & T. Trust Co.*, 59 Neb. 53, 80 N. W. 257. It is also cited in 2 *Jones on Mortgages*, sixth edition, section 1118, where it is said: "But if it [the foreclosure] operates not only as an assignment of the prior mortgage, but as a foreclosure of the equity of redemption subject to the junior mortgage, the purchaser standing in the place of the mortgagor or owner of the premises is not liable to account for the rents and profits." It has also been cited with approval by the supreme court of Indiana in *Catterlin v. Armstrong*, 79 Ind. 514, *Gaskell v. Viquesney*, 122 Ind. 244, 77 Am. St. Rep. 364, 23 N. E. 791, and by the supreme court of Minnesota in *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765. We are satisfied with this rule, and it may be said that it has been so long established in this state that it has become a rule of property, and we see no good reason to depart from it at this time. We are therefore of opinion that in the present proceeding the city is not entitled to an accounting.

3. The city also insists that the decree in question should be made more definite and certain in the description of the property ordered sold to satisfy its lien. No authorities are cited in support of this contention, and the main complaint

is that the numbers of the lots and block on which the power-house mentioned therein is situated, are not given. It appears that the city did not complain of the description at the time the decree was rendered, and that question was not presented to us on its appeal to this court. So it is doubtful if it can be heard to complain of that matter at this time. But we are of opinion that the decree should more specifically describe the property in question. The record discloses that it is a matter of common ⁵²⁸ knowledge that there is but one street railway power-house on Ninth street in the city of Lincoln, and that is situated on the south half of block 102 in said city. There is no hard-and-fast rule which applies to the description of property, either in a deed of conveyance or a decree; and parol evidence is admissible to identify the land, if it be only described by name. In *Coleman v. Manhattan Beach Improvement Co.*, 94 N. Y. 229, the description "Pelican Beach near Barren Island" was held good. In *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671, "a house and lot of land on Amity street" was held sufficient, and parol evidence was admitted to correct the latent ambiguity. Keeping in mind the rule, "That is certain which can be made certain," it seems clear that the description contained in the decree, to wit, "The power-house on Ninth street," is a sufficient description of that property to sustain the decree, and the defect furnishes no ground to vacate it or for the appointment of a receiver.

4. The city further contends that it was entitled to have the decree modified, or a supplemental decree entered, declaring that the sale thereunder should be made without the right of redemption. The decree gives the city a lien on the real estate belonging to the street railway company, and specifically denies its right to a lien on personal property. Section 3, article 9 of the constitution, grants the owner of real estate sold for the nonpayment of taxes or special assessments of any character whatever the right of redemption for a period of two years from the date of sale, and in one of the former appeals in this case it was held that this provision applied to the assessments in question, and was self-executing: *Lincoln St. R. Co. v. City of Lincoln*, 61 Neb. 109, 84 N. W. 802. That holding is decisive of this question, and the judgment of the district court on that point must be affirmed.

5. Counsel for the city have not argued the question of setting aside or vacating the decree of March 12, 1902, in their brief, and we have the right to treat it as waived; but it may be said, in passing, that the facts on which the ⁹²⁰ prayer for that relief is based were challenged and attacked at the trial resulting in that decree. Counsel not only refused to offer in evidence paragraphs 15 and 16 of the stipulation in question on that trial, but were permitted to and did go behind that document and introduced all the proof at their command to show that the bonds secured by the New York Security and Trust Company's mortgage were not issued and delivered in the manner and at the time recited therein. The issue thus litigated was decided against the city, and it is conclusively bound by that decree. Its correctness cannot now be questioned in a proceeding of this kind.

When this proceeding was commenced, the city made an application for the appointment of a receiver, but the application was withdrawn, by leave of the court, and made the basis of another action before another judge of the district. So that matter is not presented for our determination in this case. Neither have we decided the questions presented by the defendants relating to matters of practice or procedure in like cases, because we have deemed it best to decide this case on its merits.

After having carefully examined the record and considered all of the questions presented by counsel, we are of opinion that the judgment of the district court was substantially right, and it is therefore affirmed in all things except as to description of the property; that as to said matter the judgment of the district court be reversed, and the cause is remanded, with directions to the trial court to so correct the decree as to more specifically describe said property; and that the appellee recover its costs in this court.

Judgment accordingly.

Letton, J., not sitting.

A Purchaser at a Foreclosure Sale who afterward becomes the owner of the mortgaged premises by conveyance from the assignee in bankruptcy of the mortgagor is not liable for the rents and profits to a junior mortgagee not made a party to the foreclosure proceedings: *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364. See, in this connection, *New England Mtg. etc. Co. v. Fury*, 143 Ala. 637, 111 Am. St. Rep. 62; *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115; *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204.

NORTON v. BRINK.

[75 Neb. 575, 110 N. W. 669.]

PARTNERSHIP IN LANDS.—A parol agreement between two persons to purchase land “in partnership,” the purchase being made by one of them, who pays the whole purchase price, and takes the title in himself, the other agreeing to pay him one-half of the purchase price on demand, does not constitute a partnership in the purchase of such lands. (p. 824.)

STATUTE OF FRAUDS—Partnership in Lands.—A parol agreement by the buyer of lands to admit another into partnership with him is void as within the statute of frauds. (p. 824.)

STATUTE OF FRAUDS—Partnership in Lands.—A parol agreement between two persons to purchase land “in partnership,” the purchase being made by one of them, who pays the whole purchase price, and takes the title in himself, is void as within the statute of frauds. (p. 825.)

TRUSTS—Purchase of Lands.—A purchase of real estate completed on the credit of two, and afterward paid for wholly by one of them, does not, of itself, give rise to a resulting trust in favor of the other. (p. 826.)

J. N. Dryden, E. C. Calkins and L. P. Main, for the appellant.

F. E. Beeman and H. M. Sinclair, for the appellee.

⁵⁷⁵ BARNES, J. This case was originally submitted to department No. 2 of the commission, and an opinion was written, filed and ⁵⁷⁶ announced, reversing the judgment below: See 75 Neb. 566, 106 N. W. 668. A rehearing has been allowed, the case has been reargued and submitted to the court, and the question now is, Shall we adhere to our former decision? In order to determine that question, it is proper to set forth the contract sued on, which the appellant claims has been established by the evidence. The action was commenced by the appellant against Jay H. Brink, the son and only heir at law of one C. D. Brink, deceased, and the petition recites, in substance: “That the said plaintiff and said Brink, the deceased, entered into a verbal contract, wherein and whereby it was mutually agreed that the west half of section 30, township 10, range 15 west in Buffalo county, should be purchased in partnership, each party to pay one-half of the purchase money, expense of operating the same, and, upon sale, divide the profits or loss, as the case might be; that it was further agreed that said Brink should advance the entire purchase money, take the legal title in his name, and

that plaintiff should, upon demand, reimburse the said Brink for half of the purchase price so advanced, with interest at six per cent per annum." The petition further alleges: "That said premises were purchased for the sum of four thousand dollars, said Brink paying the entire purchase price, the legal title being vested in the said C. D. Brink, as aforesaid. . . . That on the thirtieth day of November, 1902, and before any demand had been made for the repayment of the purchase money, and before any settlement had been had between the plaintiff and the said C. D. Brink in respect to said partnership, as aforesaid, the said C. D. Brink departed this life, leaving his son his sole heir at law, the defendant herein; that since the death of the said C. D. Brink, the plaintiff has at all times been ready and willing to pay her share of the said purchase money, and interest upon the same, but that the defendant refused, and continues to refuse, to accept the same; that on or about the fifteenth day of May, 1903, said defendant sold said premises for the sum of six thousand four hundred dollars, and refused to recognize said partnership agreement, and refuses to pay the ⁵⁷⁷ plaintiff any portion of the profits realized upon the said land, as aforesaid." The petition concludes with a prayer for an accounting of the purchase money, for the rents and profits, and that the defendant be required to pay her the sum of twelve hundred dollars with interest from May 15, 1903, as her share of the profits realized from the sale of said lands. Upon the contract thus set forth the right of the appellant to maintain this action must stand or fall.

Her first contention, briefly stated, is that the contract established a partnership between herself and the deceased, and comes within the rule announced in *Dale v. Hamilton*, 5 Hare (Eng.), *369; *Richards v. Grinnell*, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; *Pennybacker v. Leary*, 65 Iowa, 220, 21 N. W. 575, and other cases, which hold that a contract entered into for the purpose of speculating in lands is not within the statute of frauds and need not be in writing; that where the parties have contracted to engage in the venture of buying lands which are to be held in trust for both of them, and they are to have equal interests and shares in the common speculation, such agreement constitutes a partnership, and an action by one partner against the other for an accounting as to the partnership transactions may be maintained, although the partnership funds may be invested in

land. While the authorities are divided on this question, we deem it unnecessary to express any opinion as to the soundness of this rule, because it seems clear to us that the agreement here in question is not embraced therein. It will be observed that nothing is said in this contract about entering into a general or special partnership, or that the purpose thereof was to sell the land for profit. Its language is: "It was mutually agreed" that said land "should be purchased in partnership." Buying land together does not make the purchasers partners, nor does the transaction constitute a partnership, with its rights, duties and obligations, as defined by law. "A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals, for the purpose of joint profit": 1 ⁵⁷⁸ Bates on Law of Partnership, sec. 1. To constitute a partnership there must be a mutual agency, and a communion of profit and loss, and the parties must assume the partnership relation. It seems clear to us that the contract to purchase the land in question as partners, conceding for the purpose of this opinion that such contract was established by the evidence, together with the purchase of the land by Brink, the deceased, and payment therefor with his own money, did not establish a partnership between the appellant and the deceased. Again, the appellant did nothing upon her part, contributed nothing, risked nothing, and there was no consideration to support the contract. It will be observed that, under the agreement, a sale of the land was not obligatory upon anyone. In short, there is nothing in the contract that distinguishes it from the ordinary agreement of two or more persons to purchase land together, not for the profits of speculation on resale, but for the profits arising out of the ownership of the land itself, and this must be held to be the true meaning of the contract. But, however this may be, there was no sale of the land by the alleged partnership; neither was there any sale of it by the deceased who, it is claimed, was one of the partners, and by his death the partnership, if one ever existed, was terminated. The petition discloses that Brink died on the thirtieth day of November, 1902, and within five months after he purchased the land in question. After his death the partnership could not sell the land, because, if there ever was a partnership, it had then ceased to exist. The appellant could not sell the land as a surviving partner, because, according to the theory advanced

by counsel to support her case, she had no interest or estate therein. At any rate, she had no title to convey. Again, counsel has not pointed out to us any rule of law or equity that authorizes the appellant to maintain a suit for an accounting against the heir of her alleged deceased partner. It seems to us that this case falls within the rule announced in 1 Bates on Law of Partnership, section 302, where it is said: "A parol agreement by the buyer of lands to ⁵⁷⁹ admit another into partnership with him is void under the statutes of frauds, as not different from the contract of buyer and seller."

There is a clear distinction between the case at bar and those cases where a partnership was formed to deal or speculate in lands, and lands are bought with partnership funds, in pursuance of such an agreement. In *Levy v. Brush*, 45 N. Y. 589, it was held that a verbal contract between two parties by which one is to purchase land on joint account of both, and each to contribute a moiety of the purchase money, the title to be made to both, is void under the statute of frauds. In that case, the defendant bid off the land in his own name, and took a contract therefor, but refused to convey one-half of the contract to the plaintiff, and it was held that no action would lie to compel the execution of the agreement, because such an arrangement did not constitute a partnership between them; that the defendant had made no valid contract, and had a perfect right both in law and equity to refuse performance.

In our former opinion (75 Neb. 566, 106 N. W. 668), it was said, on the authority of *Smith v. Putnam*, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288, "that in cases of this character, where the agreement relating to the land has been fully completed and nothing remains to be done but to distribute the profits of a sale made, then the partnership relation may be established by parol," and the judgment of the trial court was reversed mainly upon that authority. It would seem that the learned commissioner who wrote the opinion overlooked the allegations in appellant's petition charging the defendant with refusing to recognize her rights, and with repudiating the alleged contract of partnership. Again, an examination of *Smith v. Putnam*, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288, discloses the fact that the contract there was an oral agreement between the plaintiff and the defendants that plaintiff should investigate desirable timbered lands, and,

on defendants' approval, they would purchase, and either sell or log them. The agreement was that the plaintiff should take charge of the driving of the logs, which contemplated his rendering material and valuable services as ⁵⁸⁰ his contribution to the partnership funds. They entered upon the agreement, and the plaintiff did render services of value to the partnership. It was held that this agreement constituted a partnership, and, where the contract had been fully completed and executed, and nothing remained but to divide the profits, an action for an accounting and to recover such profits would lie. If the rule there announced could be applied in the case at bar, it could be applied to any case of oral contract to purchase land on joint account. If the transaction would otherwise be within the statute of frauds, it would only be necessary for the parties to stipulate that it should be a partnership, and the statute would be avoided. So we are constrained to hold that the contract here in question did not create or constitute a partnership.

2. Appellant next contends that, while the contract does not create an interest in the land in question, and therefore is not within the statute of frauds, yet by the agreement, and the facts relating to the purchase, a resulting trust was created in her favor; that by reason of such trust relation she acquired a half interest in the land, and is entitled to recover one-half of the profits arising from the sale thereof from the defendant, who took the title to the land by inheritance. It would seem that her position is not maintainable. The fact that the appellant paid or contributed nothing toward the purchase price of the land is fatal to her contention. The rule is that, in order to establish a resulting trust of this class, it is necessary that the person paying the purchase money should have actually paid it as his own, as a part of the original transaction, at or before the time of the conveyance. The whole foundation of resulting trusts of this class is the ownership and payment of the purchase money by one, when the title is taken in the name of another: 10 Am. & Eng. Ency. of Law, 1st ed., sec. 8; 2 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1037. And we are not aware that the soundness of this rule has ever been seriously questioned.

In *Brooks v. Fowle*, 14 N. H. 248, it was said: "A purchase ⁵⁸¹ of real estate completed on the credit of two and

afterward paid for wholly by one of them does not, of itself give rise to a resulting trust."

In *Hackney v. Butts*, 41 Ark. 393, it was held that, where no money is advanced, and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee. The rule of equity is that a resulting trust must have arisen at the time the purchase was made, and the money or consideration must have been paid, or secured to be paid, by such third party, at or before the purchase: *McElroy v. Swope*, 47 Fed. 380. The same rule has prevailed in this court since the decision of *Hoehne v. Breitzkreitz*, 5 Neb. 110. In *Cameron v. Nelson*, 57 Neb. 381, 77 N. W. 771, Commissioner Irvine said: "Next, there are cases where two men join in the purchase of land, taking title in one, who is to resell and divide the profits. Such contracts are usually enforced, although not in writing, but it will be seen there is in such cases a resulting trust from contributing to the purchase money."

It is urged that the case of *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058, 5 L. R. A., N. S., 112, sustains our former opinion. An examination of that case discloses that it was one where a person employed an agent to negotiate the purchase of certain real estate for him; that the agent, while acting as such, became himself the purchaser; and it was held that he should not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself, and, if he makes such purchase, he will be considered as holding the property in trust for his principal. So it seems clear that the rule there announced has no application to the facts in the case at bar. We are therefore of opinion that the contract, the purchase of the land, and the facts surrounding the transaction were insufficient to create a resulting trust in favor of the appellant.

Counsel for the appellee insists that the appellant's right to recover has been adjudicated by the county court of 582 Buffalo county, in the matter of the claim filed by her against the administrator of the estate of C. D. Brink, on account of the purchase of the land in question, adversely to such right; that the judgment in that case is a bar to her right to recover in this action. We deem it unnecessary to determine that question, because we are constrained to hold: First, that no partnership was created by the transaction in

question between the appellant and the deceased, C. D. Brink; that the contract relied on by the appellant is within the inhibition of section 3, chapter 32, Compiled Statutes of 1905 (Annotated Statutes, 5952), commonly called the statute of frauds. Second, that no resulting trust in favor of the appellant was created thereby. It also seems clear that, in order to maintain this action against the heir of the deceased, appellant must have had an interest in the land in question, which she could follow into his hands, and either compel him to convey to her her interest therein, or account to her for the profits arising from the sale thereof. For the want of such interest, as well as for the other reasons above stated, she cannot maintain this action.

Our former judgment is therefore vacated, and the judgment of the district court dismissing the appellant's cause of action is affirmed.

Judgment accordingly.

LETTON, J. I concur in the conclusion reached. I think the action cannot be maintained for two reasons:

1. Granting that the relation between the plaintiff and the deceased was a partnership relation, the plaintiff's interest was not in the land itself, but in the profits derived from the transaction. This was a personal liability of the deceased, and, consequently, a liability of his estate, for which the administrator was answerable out of the estate. To hold that the plaintiff could follow the land itself would be to say that the alleged oral contract gave her an interest in the land, which would be obnoxious to the statute ⁵⁸³ of frauds. If the alleged partnership had been to deal in livestock or merchandise, the title to which was taken in the name of the deceased, his estate would be liable to account to the other partner. The fact that the property, which is alleged to have been the subject of the partnership, was real estate does not change the rule. It is not the property itself, but her interest in the profits derived from the same, which the plaintiff is seeking to recover, and this, in my view, is the only theory upon which she may maintain such an action: *Everhart's Appeal*, 106 Pa. 349; *Bunnel v. Taintor's Admr.*, 4 Conn. 568; *McElroy v. Swope*, 47 Fed. 380.

2. The plaintiff properly filed her claim in the county court of Buffalo county against the estate for her share of the profits. A demurrer to this claim was filed, was sus-

tained by the county judge, and her action dismissed. No appeal was taken, and this judgment stands in full force and effect. The county judge testified, in substance, that the attorney for plaintiff said he would withdraw it or it could be dismissed, but that, a demurrer or objection having been filed, he thought he would make some order upon it, and he made the order dismissing or disallowing the claim; that there never was any hearing upon the merits. This testimony is not sufficient to vacate, set aside or annul the adjudication of the claim, as shown upon the records. If the judgment was inadvertently rendered or made by mistake, the plaintiff's remedy was to have it set aside by the means provided by law for that purpose. Until this is done, it stands as an adjudication, and cannot be obliterated by parol testimony, either of the judge who rendered it or of any other individual. As it now stands, it finally adjudicates the plaintiff's claim against her, and she cannot maintain another action upon the same cause.

The Effect of Verbal Contracts between two or more persons to purchase land of another is discussed, in their relation to the statute of frauds, in the note to *McCoy v. McCoy*, 102 Am. St. Rep. 239. It has recently been held that if two persons make an oral agreement to form a partnership and each to buy in his own name certain town lots, both thereafter to pay for and own them as partners, the agreement constitutes a partnership and is not within the statute of frauds: *Garth v. Davis*, 120 Ky. 106, 117 Am. St. Rep. 571. See the note to *Brotherton v. Gilchrist*, 115 Am. St. Rep. 400.

IN RE MACRAE.

[75 Neb. 757, 106 N. W. 1020.]

INTOXICATING LIQUORS—License—Evidence.—If an applicant for a liquor license shows *prima facie* that the signers of his petition possess the necessary statutory qualifications, a finding in his favor will not be disturbed on appeal. (p. 831.)

INTOXICATING LIQUORS—Sale to Minor.—If a minor purchases liquor for another who sends him to buy it, and whose money pays for it, and the dealer knows that the real purchaser is an adult and that the minor is only his messenger, the dealer cannot be convicted of selling liquor to a minor. (pp. 831, 832.)

INTOXICATING LIQUORS—Sale to Minor.—Merely to deliver liquor to a minor, with notice that it is to be carried to an adult is not a sale within the meaning of the statute. (pp. 832, 833.)

INTOXICATING LIQUORS—Application for License—Sale on Sunday.—If an applicant for a liquor license is charged before the licensing board with having sold liquor on Sunday, and the evidence is conflicting, a finding in his favor on that question will not be reversed on appeal. (p. 833.)

INTOXICATING LIQUORS—Screens—License.—If the apparent purpose of a statute is to secure to the proper authorities at all times an unobstructed view of the manner in which intoxicating liquor is being sold, and the evidence shows that an applicant for a liquor license so screened the windows and doors of his place of business as to obstruct the view, a licensing board must refuse to issue him a license. (pp. 833, 834.)

Montgomery & Hall, for the plaintiff in error.

W. J. Connell, for the defendant in error.

⁷⁵⁸ BARNES, J. Charles Metz, the defendant herein, applied to the board of fire and police commissioners of the city of Omaha for a license to sell malt, spirituous and vinous liquors at No. 2705 Leavenworth street, in said city, for the period of one year, commencing on the first day of January, 1904, under the city ordinances and the provisions of chapter 50, Compiled Statutes of 1903 (Annotated Statutes, 7150-7184). To this application the plaintiff, John D. MacRae, filed a remonstrance, alleging that the applicant's petition was not signed by thirty freeholders of the ward in which the business was to be conducted; that the applicant had been guilty of a violation of section 8 (Annotated Statutes, 7157) of said chapter 50, in that, during the preceding year, he had sold liquors and intoxicating drinks to minors; that the applicant had been guilty of selling intoxicating liquors on the first day of the week, commonly called Sunday; and that he had been guilty of violating the provisions of section 29 (Annotated Statutes, 7179) of the act in question, in that he failed to keep the windows and doors of his place of business ⁷⁵⁹ unobstructed by screens, blinds, paint or other articles. After a full hearing, the board overruled the protest and remonstrance, and granted the license as prayed for by the applicant. The remonstrator appealed to the district court for Douglas county, where the order of the board was affirmed, and from that judgment he brings the case to this court by petition in error.

1. The plaintiff's first contention is that the court erred in sustaining the finding and judgment of the licensing board that the petition was signed by a sufficient number of freeholders residing in a ward where the business was

to be conducted. In order to procure such a license, the applicant must show that the signers of his petition possess the qualifications required by the statute; and, recognizing this rule, the applicant at the outset of the hearing introduced his evidence tending to establish that fact. While this evidence is not very conclusive, yet we are satisfied that it made at least a *prima facie* case, and, as the plaintiff herein introduced no contradictory proof, it was sufficient to sustain the finding of the board on that question.

2. It is next contended that the license should have been refused, for the reason that the applicant had violated the provisions of section 8 (Annotated Statutes, 7157) of the act in question by selling intoxicating liquors to minors. The burden of proving that charge was on the remonstrator, and in order to establish it he showed by one Fred Steinhauser, a minor, that he had frequently obtained beer at the applicant's saloon during the preceding year, but he also stated that he procured it for his mother, and never drank any of it himself. The applicant's bartender testified to the same fact, and added that he delivered the beer to the witness only when he was sent for it by his folks; that he delivered it to him to carry to his mother and sister, who were both adults. This requires a decision of the question whether the sales above described were sales to a minor, and within the inhibition of the law.

It is proper to say at the outset that the authorities ⁷⁰⁰ are somewhat divided on this question. In some jurisdictions it is held that a mere delivery of intoxicating liquor to a minor constitutes a sale within the meaning of the statute. But these decisions turn mainly upon the peculiar wording of the statutes on which they are based, and it would seem that they are not sustained by the weight of authority. In Black on Intoxicating Liquors, section 420, it is said: "When a minor purchases liquor, not for his own consumption, but for the use of another person, as whose agent or messenger he is acting, and to whom the sale might lawfully be made, the guilt or innocence of the seller will depend upon the disclosure to the seller of the fact of agency, because, so far as concerns the seller, that will determine the person who is to fill the character of purchaser. If the minor informs the liquor dealer that the liquor purchased is for the use of another person, who has sent him to buy it, and with whose money he pays for it, such being in truth the case; or if the

dealer knows, from other sources of information, that the real purchaser is an adult and the minor is only his messenger, then the sale takes place between the dealer and the adult, the minor is not concerned in it except as he is merely the conduit by which the money is conveyed to the one and the liquor to the other, and consequently the dealer cannot be convicted of selling to the minor." This doctrine seems to be sustained by *Commonwealth v. Lattinville*, 120 Mass. 385; *O'Connell v. O'Leary*, 145 Mass. 311, 14 N. E. 143; *State v. McMahon*, 53 Conn. 407, 55 Am. Rep. 140, 5 Atl. 596; *State v. Walker*, 103 N. C. 413, 9 S. E. 582; *Monaghan v. State*, 66 Miss. 513, 6 South. 241, 4 L. R. A. 800; *Wallace v. State*, 54 Ark. 542, 16 S. W. 571; *Randall v. State*, 14 Ohio St. 435. In *Monaghan v. State*, 66 Miss. 513, 6 South. 241, 4 L. R. A. 800, it was said: "To 'sell' liquor to a minor is what is forbidden by the statute. Merely to deliver liquor to a minor, with notice that it is to be carried to an adult, is not a sale within the meaning of the statute. We cannot extend the terms of a criminal statute beyond its clear legal meaning. We cannot construe the word 'sell' in the statute to mean something different from its ordinary legal import. Undoubtedly, ⁷⁶¹ a minor may be an agent or lawfully go on errands for an adult, and a person may buy through an agent, and in such case, there being no question of the fact of agency, although the dealing is with the agent, and the delivery to him, in legal effect the sale is to the principal. The law is, that where a person contracts as agent, or he is known to be such, the contract is with the principal, and not with the agent; but where the agent deals in his own name, and the principal is not disclosed or known, the contract is with the agent and he is liable."

Therefore, it was proper for the applicant to show that the liquor was drawn and delivered to the minor in pursuance of an agreement with his parent for its purchase and subsequent delivery to her. It has also been held that, as between a seller and an agent who deals with him without disclosing the fact that he acts in that capacity, the latter as well as the principal may be regarded as the purchaser. So it may be possible for a liquor seller who contracts with the minor to be convicted of selling liquor to him, notwithstanding the fact may subsequently be disclosed that the minor acted as the agent for an adult. It would seem to follow that, where liquor is sold and delivered to a minor under the belief on the part of the seller that it is for an adult, yet, if the case

should prove to be one where the minor was in fact purchasing it for himself and thus used it, such belief of the liquor dealer would constitute no defense to a charge of unlawful sale to such minor. In other words, a liquor seller who delivers intoxicating liquors to a minor does so at his peril; and, if it afterward appears that the minor obtained it by a false statement that it was for the use of an adult, the false statement will constitute no defense to a prosecution based on such sale. So we are of the opinion that the evidence in this case failed to show that the applicant was guilty of the sale of intoxicating liquors to a minor as alleged in the remonstrance.

3. The question of the sale of intoxicating liquors on Sunday by the applicant in this case is not free from ⁷⁶² doubt. Two or three witnesses testified that they had purchased beer at the applicant's saloon on Sunday within the year next preceding the filing of his application. This fact was denied, however, by the applicant and his bartender, who testified that the witnesses for the remonstrator were not in the applicant's saloon, and that he sold no liquor to them on the occasions mentioned by them. So there was a conflict of evidence on that point, and we are inclined to think that the district court did not err in sustaining the finding of the licensing board on that question.

4. This brings us to the fourth and last contention presented for our consideration. It was claimed by the remonstrator that the applicant had been guilty during the preceding year of violating the provisions of section 29 (Annotated Statutes, 7179) of the act, which reads as follows: "It shall be the duty of all venders of malt, spirituous, or vinous liquors, under the provisions of this act, to keep the windows and doors of their respective places of business unobstructed by screens, blinds, paint, or other articles, and any person offending against the provisions of this section thereof shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than twenty-five dollars, or be imprisoned in the county jail not less than ten days, or both, at the discretion of the court, and shall have his license revoked by the same authority granting the same." Considering this section with the other provisions of the chapter of which it is a part, it seems apparent that its purpose was to secure to the proper authorities at all times an unobstructed view of the manner in which intoxicating liquor is

being sold, so that, without effort, the persons charged with the enforcement of the law can readily ascertain whether its terms are being violated or not. It seems that it is a violation of the section to place curtains or screens that obstruct the view of the place where the business is being conducted: *Black on Intoxicating Liquors*, sec. 153; *Commonwealth v. Worcester*, 141 Mass. 58, 6 N. E. 700.

⁷⁶³ The evidence introduced on the hearing by the remonstrator showed conclusively that the front windows of the applicant's place of business have a heavy damask cloth, perhaps thirty-six to thirty-eight inches wide, stretched across them, and, in addition to this heavy cloth that covers the lower half of the windows, there are large curtains that pull down, thus completely covering them; that in front of the door there is a kind of screen, with a glass that stands up against the counter; that on Sundays, during the year preceding the filing of the application for a license, the top curtains were pulled down, and from the street one could not see into the applicant's place of business at all; that on week days it was only possible to see inside by climbing up and looking over the screen and curtains. On the cross-examination of the witnesses for the remonstrator it was brought out that the curtains and the screen had for several years been in about the same condition. The evidence clearly shows that the curtains, both lower and upper, and the screen, standing some distance inside of the front door, were so arranged as to obstruct the view of the interior of the room in which the applicant's business has been conducted. That this amounts to a violation of the statute, no matter where the obstructions to the view were placed, whether at the windows and doors or some distance away from them, cannot be doubted: *Commonwealth v. Kane*, 143 Mass. 92, 8 N. E. 800.

The applicant introduced no evidence to dispute the existence of the foregoing facts, and there was no conflict of evidence on this point. It follows that it was the duty of the board to find that "it was satisfactorily proved" that the applicant had been guilty of a violation of the provisions of section 29, as alleged in the remonstrance, and, for that reason, to refuse a license to the applicant. For the failure of the board to perform its plain duty in that behalf, and for the failure of the district court to so find, the judgment of the district court must be reversed and the cause remanded. As the license period in question has long since expired, the only

thing left for the district court ⁷⁶⁴ to do is to reverse the order of the licensing board at the costs of the applicant.

A Person Selling Liquor to a Minor who does not inform the seller that he is acting as agent for another, nor present an order for the liquor, is guilty of selling liquor to a minor, although he is in fact purchasing for an adult third person: *Tony v. State*, 144 Ala. 87, 113 Am. St. Rep. 20. And if an adult, accompanied by a minor, applies for liquor to be drunk at his expense for both himself and the minor, and the dealer thereupon furnishes it to be used by both, he is guilty of trafficking in liquor with a minor: *Nelson v. State*, 111 Wis. 394, 87 Am. St. Rep. 881.

McPHERSON v. McPHERSON.

[75 Neb. 830, 106 N. W. 991.]

HUSBAND AND WIFE—Adverse Possession Between.—If a husband claiming title to land under a void tax deed makes a quit-claim deed thereof to his wife, and they jointly occupy the land, he thereafter acquiring a patent title thereto, but not asserting title against his wife until after the statute of limitations has run in her favor, the wife acquires title to the land by adverse possession. (p. 837.)

HUSBAND AND WIFE—Title by Prescription.—If a husband has entered into possession of a tract of land under a void tax deed, and is asserting title in such a manner as to have the benefit of the occupying claimant's law and the statute relating to title by prescription, and while the statute is running in his favor conveys to his wife, he cannot interrupt the running of the statute in her favor by buying in the legal title, unless he asserts that title to the same effect that his grantor would be required to do. (pp. 838, 839.)

Jefferis & Howell, for the appellant.

H. Aye and F. A. Brogan, for the appellee.

⁸³¹ DUFFIE, C. This action was brought to quiet plaintiff's title to eighty acres of land. In October, 1876, the land was sold at private sale for delinquent taxes by the treasurer of Washington county and purchased by the defendant Daniel McPherson. A treasurer's deed was issued to him in October, 1878, and on the same day he caused the deed to be recorded in the office of the county clerk. It is conceded that the tax deed is void upon its face, for the reason that it does not have the seal of the treasurer impressed thereon. At the time of purchasing this land at tax sale the plaintiff and defendant were husband and wife, and living together on a four-acre

tract adjoining the land in controversy. In 1887 a public road was established separating the tract upon which the parties lived from the premises in dispute. McPherson took possession of the land at the time of his purchase at the tax sale, and thereafter continued to use and occupy the same for farming purposes, raising crops thereon until January 14, 1884, when he caused a conveyance by quitclaim deed to be made through a third party to his wife, the plaintiff herein, the expressed consideration in the deed being five hundred dollars. On February 24, 1886, the defendant procured a conveyance by quitclaim deed from the parties holding the patent title to said land, and this conveyance he kept from record until June 16, 1894. From January 14, 1884, the date of the conveyance to his wife, until June 16, 1894, the plaintiff and defendant continued to live together as husband and wife on the four-acre tract above mentioned, and the eighty acres in question were worked and farmed by the defendant with the knowledge of the plaintiff, and the ~~832~~ proceeds of said premises were used in the support of defendant McPherson and his family, including the plaintiff, without any specific contract or agreement being made as to the same; and from February 24, 1886, to June 16, 1894, the plaintiff had no knowledge of the deed from the owners of the patent title to the defendant. During all the time from January 14, 1884, until June 16, 1894, the plaintiff and defendant worked together as husband and wife for the mutual benefit and support of each other and family, and the premises in question constituted their only farm lands in connection with their home on the four-acre tract upon which they actually resided. From June 16, 1894, until the commencement of this action the defendant farmed said premises and asserted ownership thereof as against the plaintiff. For four or five years prior to the commencement of this suit the defendant McPherson has had the exclusive use and occupancy of said premises. From January 14, 1884, to February 24, 1886, the defendant never made any claim to said premises, and from February 24, 1886, to June 16, 1894, did not specifically, or in express terms make any claim to the plaintiff that he was the owner thereof. The above facts all appear from an agreed statement of facts filed by the parties in the trial court. The trial resulted in a decree dismissing the plaintiff's bill, and awarding costs to the defendant. From this decree she has appealed to this court.

From the foregoing statement it will be seen that the defendant's conveyance to his wife was made something more than seven years after his purchase of the land at tax sale, and more than five years after the receipt and recording of his tax deed, and that during this time he was in the actual possession of the land claiming to own the same. While his tax deed was void, it conferred color of title under which a continued uninterrupted possession for ten years from the date of his entry thereunder would give him good title by prescription. His tax deed, also, under our statute relating to occupying claimants, protected ⁸³³ him in his possession until he should be reimbursed for improvements made upon the land, if any, and for taxes paid thereon, with statutory interest: *Lothrop v. Michaelson*, 44 Neb. 633, 63 N. W. 28. His conveyance to his wife vested in her all the rights in the land which he possessed, and her possession could be tacked to his own in support of a claim of title by prescription: *Lantry v. Wolff*, 49 Neb. 374, 68 N. W. 494.

The rule is well established that to interrupt the possession an action must be commenced against the claimant by the true owner, or a re-entry on the premises made by him. To interrupt the possession by re-entry by the owner, the intention to take possession must be sufficiently indicated by words or acts, by express declaration, or by exercise of acts of ownership inconsistent with a subordinate character: 1 Cyc. 1010. As stated in *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186, the owner may tread upon his own soil and still be as much out of possession of it there as elsewhere. In other words, the re-entry must be in hostility to the possession of the claimant. The party from whom the defendant acquired the patent title could interrupt the plaintiff's possession only by suit commenced for that purpose or by a re-entry into the premises under a claim of title. Had he become a boarder in the plaintiff's family, and lived with her upon the premises for any length of time without manifesting his intention of claiming possession in his own right, the possession of the plaintiff would not be thereby interrupted, and we are at a loss to see how by his deed of conveyance to the defendant he could confer on him any greater right than he himself possessed. For eight years after acquiring the patent title the defendant kept the deed from record, and made no claim to the land; at least, he gave the plaintiff no reason to believe that he asserted a claim as

against the title and rights which he had conveyed to her. It is true that he was in possession with her, but as long as he asserted no possession in himself and claimed no title to the premises, it must be conclusively ⁸³⁴ presumed that his possession was in subordination to hers. The case is very different from that of *Hovorka v. Havlik*, 68 Neb. 14, 110 Am. St. Rep. 387, 93 N. W. 990, where title was claimed by the husband through a deed from the wife, and also by adverse possession as against her title. The deed was held invalid, and a claim of title by adverse possession was denied, there being no reason to believe that a hostile adverse possession had been asserted against her, or that any claim of adverse ownership by possession could be presumed as long as the parties were occupying the premises as husband and wife. Until, as in the present case, some reason exists for the assertion of a title by the husband or wife, one against the other, the presumption will conclusively obtain that the possession of each is through and on account of the family relation, and not under a claim of ownership adverse to the title under which possession was taken, in whichever of the parties that title may be. It was urged in the argument at bar, and some of the cases support the rule, that the law will not countenance a claim of adverse possession made by one spouse against the other; that public policy, having in view the preservation of the integrity of the marriage state, will not countenance a rule tending to disrupt the peaceful relation of the parties; but this argument, if good, would have equal weight against the maintenance of a suit by husband or wife to recover a debt due from one to the other, or to foreclose a mortgage upon the premises occupied by them for money loaned by one to the other; and it would hardly do for the courts to read into the statute of limitations an exception which the legislature has seen fit to omit, because, in their opinion, the family relations would be better preserved by refusing to enforce it in its entirety between husband and wife. The case we are considering is an exception to any to which our attention has been called, but we are quite clear that when the husband has entered into possession of a tract of land under a void deed, and is asserting title in such a manner as to have the benefit of the occupying claimant's law and the statute ⁸³⁵ relating to title by prescription, and, while the statute is running in his favor, conveys to his wife, he cannot interrupt the running of the statute in her favor

by buying in the legal title, unless he asserts that title to the same effect that his grantor would be required to do.

We recommend a reversal of the decree appealed from, and that the cause be remanded, with directions to the district court to enter a decree in favor of the plaintiff.

Albert and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree appealed from is reversed and the cause remanded, with directions to the district court to enter a decree in favor of the plaintiff.

Husband and Wife cannot Hold Adversely to each other while residing together on the same tract: *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38; *Hovorka v. Havlik*, 68 Neb. 14, 110 Am. St. Rep. 387. In Utah, however, a plural wife may acquire title to real estate of her husband by adverse possession founded on a gift: *Raleigh v. Wells*, 29 Utah, 217, 110 Am. St. Rep. 689.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. WELLS.

[184 N. Y. 275, 77 N. E. 19.]

TAXATION—Capital Employed in the State—Proceeds of Sales of Property Imported by a Foreign Corporation.—Cash and bills receivable belonging to a foreign corporation and resulting from sales of property imported by it represent capital employed within the state within the meaning of the tax laws of New York. (p. 841.)

TAXATION—Burden of Proof.—The presumption is that the determination of the assessor is correct, and to relieve himself from an assessment it is incumbent on the person assessed to show clearly that the assessment was erroneous. (p. 842.)

TAXATION—Situs of Property.—For the Purpose of Taxation of Promissory Notes and Similar Instruments for the payment of money, where the debt is inseparable from the paper which declares and constitutes the debt, the situs, for the purposes of taxation, is the place where they are actually and physically held. (p. 843.)

TAXATION of Property Resulting from the Sales in Original Packages Imported by a Foreign Corporation.—Cash and bills receivable resulting from sales of property imported by a foreign corporation and sold in the original packages are subject to taxation within the state where such cash and bills receivable may be found, provided they are not in the course of transmission to the home office. (p. 843.)

Edmund Wetmore, for the appellant.

John J. Delaney, corporation counsel, George S. Coleman and Curtis A. Peters, for the respondents.

276 CULLEN, C. J. The relator is a foreign corporation engaged at Dublin, Ireland, in the manufacture of spirituous and malt liquors. It has established and maintains an office in the city of New York for the sale of its products, which

are imported into this country and sold in the original packages. The relator made application under the statute for ²⁷⁷ permission to carry on business in this state, and was granted such permission. In January, 1903, it was assessed for personal property in this state at the sum of ninety-four thousand six hundred and seventeen dollars and ninety-three cents for three separate items—the value of its office furniture, seven hundred and ninety-seven dollars and sixty-eight cents; cash on hand and in bank, six thousand one hundred and twenty-two dollars and sixty-three cents, and the remainder for bills receivable held in the city of New York.

The relator contends that so far as the last two items are concerned they do not represent capital employed in this state within the meaning of our tax law, and further, that as they are the proceeds of sales in original packages, they are not subject to taxation by the state. The first contention we will not discuss, as we deem the question settled by the recent decision of this court in *People v. Wells*, 183 N. Y. 264, 76 N. E. 24. As the point presented by the relator's second claim was not involved, or at least not raised in the case cited, we will briefly consider it.

It is well settled that while imported goods are in the hands of the importer in the original packages, they are not subject to taxation by the state, nor can any tax be imposed upon their sale by way of a license tax or percentage on the price for which they may be sold. But though no tax can be imposed either on the goods themselves or their sale, we find no authority for the proposition that the proceeds of the sales have a similar immunity from taxation. Doubtless, if the tax were imposed on the proceeds as such, and because they were derived from the sales of imported goods, it would be invalid, but if those proceeds have become part of the common mass of the property within a state, they are subject to taxation, of course without discrimination, the same as other property. In *Hibernia Savings & Loan Society v. City and County of San Francisco*, 200 U. S. 310, 26 Sup. Ct. Rep. 265, 50 L. ed. 495, the supreme court of the United States held that two checks on the United States treasury received by the appellant as interest upon certain registered government bonds held by it were taxable, though the bonds themselves were exempt from taxation. Justice Brewer there said: "Had the plaintiff drawn the money immediately upon these checks it ²⁷⁸ would have become at once a part of the general prop-

erty of the bank, and the fact that the money had been derived from the United States and paid to the bank as interest on its obligations would not have prevented its becoming part of the general property of the bank, and subject to state taxation."

The real question in this case, therefore, is whether the property on which the relator has been taxed, though belonging to a nonresident, had acquired such a situs within this state as to be subject to taxation—a question that does not depend on the source from which the property was derived. We assume that if a nonresident sold within this state property which, under the federal constitution, was immune from taxation, such as imported goods in the original packages or government bonds, and forthwith transmitted the proceeds of the sale without the state, the proceeds would not be subject to local taxation simply because in the course of transmission they happened to be physically within the state on assessment or listing day; at least the legislature has never attempted to subject such money or property to taxation. The question seems to us to be substantially the same as that which has been several times presented as to the right of the state to tax property in course of transportation through its limits to other states, for we see no difference in principle in this respect between foreign and interstate commerce. "The law on this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities": *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. Rep. 259, 47 L. ed. 359; see *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. Rep. 266, 47 L. ed. 394; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257; *Pittsburg etc. Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. Rep. 415, 39 L. ed. 538.

The evidence appearing in this record as to the exact manner in which the relator carried on its business in the city of ²⁷⁹ New York is meager, but the presumption is that the determination of the assessors was correct, and to relieve itself from the assessment it was incumbent upon the relator to clearly show that the assessment was erroneous: *People v.*

Davenport, 91 N. Y. 574. It is true that at one point in the return to the assessors, the relator's agent states that the proceeds of the sales of the goods are at once remitted to the main office in Dublin after reserving the necessary amount for paying the expenses of the business conducted in the city of New York. But this is qualified by the subsequent statement that the amounts of the bills receivable and bank accounts are invested in the city of New York. It was not denied that the notes were physically in the state of New York, and it was admitted upon the argument that both the notes and open accounts were held in New York until maturity, there collected and after collection the proceeds remitted to Dublin. It is plain that the moneys deposited in bank, so far as they are retained for the payment of duties and expenses of the New York office, are in no sense in the course of transmission abroad. The duties referred to in the statement must be duties to be paid on other goods which the relator might subsequently import or sell, not the goods which had been sold, for, as we understand it, duties must be paid in advance of taking the goods out of the custom-house. We cannot see that the condition of this bank deposit in any way differs from other bank deposits of nonresidents, and it seems to be settled by authority that the bank deposits in this state of a nonresident are subject to taxation by the state: *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. Rep. 110, 44 L. ed. 174; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439.

It is also settled that the situs for the purpose of taxation of promissory notes and similar instruments for the payment of money where the "debt is inseparable from the paper which declares and constitutes it" is the place where they are actually and physically held: *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. Rep. 110, 44 L. ed. 174; *Blackstone* ²⁸⁰ *v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439; *People v. Trustees Village of Ogdensburgh*, 48 N. Y. 390.

Therefore, unless these notes were in course of transmission to the home office of the relator in Dublin, they were properly assessed. But they were not in transitu; they were held here until maturity for the convenience of the relator and the proceeds in part then remitted. The case does not seem to differ in principle from one where a nonresident,

equally for his convenience, deposits his securities with an agent within the state for custody and collection, and in such case it has been held that such notes and securities are subject to taxation in the state where they are on deposit: *New Orleans v. Stempel*, supra. It is also to be observed that in the case before us the retention of the notes in this state was not casual or exceptional, but in accordance with the relator's regular and permanent course of business.

We think it is not necessary to consider whether the open accounts present a different question from that involved in the notes. As already stated, it was incumbent upon the relator to distinctly point out any error committed by the assessors, and if part of the bills receivable were not subject to taxation, it should have shown what the amount of that part was.

The order appealed from should be affirmed, with costs.

Haight, Vann, Werner, Willard Bartlett and Hiscock, JJ., concur.

O'Brien, J., dissents.

Order affirmed.

On a Writ of Error to the Supreme Court of the United States, it affirmed the judgment, and accompanied such affirmance by its opinion as follows:

"It is the contention of the plaintiff in error that the assessment upon ninety-four thousand six hundred and seventeen dollars and ninety-three cents, made upon office furniture, cash on hand, and in bank, and the amount receivable upon bills and accounts payable, is void, except as to the item of office furniture, because of the protection afforded by the constitution of the United States against taxes by states upon imports.

"As to the open accounts which might be included in the bills receivable, the court of appeals declined to pass upon the validity of the taxes on them, as, according to the practice in that state, it was incumbent upon the relator to point out what part on the bills receivable were of that class, but did hold that the cash, and the notes which, it was admitted, were held in New York until maturity, although the proceeds of sale of goods imported and sold in the original packages were properly within the taxing power of the state of New York under the section of the statute referred to, and that such exercise of power did not violate the constitution of the United States.

"The section of the constitution relied upon by the plaintiff in error in the argument in this court is article 1, section 10, which pro-

vides: 'No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except when made absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.'

"The contention of the learned counsel for plaintiff in error is succinctly stated in his brief as follows: 'The ground taken by the plaintiff in error is that the tax on the proceeds of the goods in original packages in the course of transmission to the owner abroad is, in essence and effect, a tax upon the sale of said goods, and, therefore, a tax upon imports and a violation of the constitution under the principle laid down in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, and the cases following that decision.'

"The case referred to (*Brown v. Maryland*) is the leading one upon this subject, and has been cited perhaps as often as any of the great decisions of Chief Justice Marshall, and not attempted to be modified in the subsequent decisions of this court. In that case this section, as well as article 1, section 8, the commerce clause of the constitution, were given consideration by the court. It was held that an act of the state of Maryland, which required an importer of foreign merchandise, under certain penalties, to take out a license from the state, for which he should be taxed fifty dollars before he should be authorized to sell the imported articles in the original packages, was in violation of the commerce clause of the constitution and within the prohibition on the states of the right to levy duty on importations. And in this connection the chief justice discussed and laid down certain general principles by which to determine whether an act of the legislature does interfere with the paramount purpose of the constitution in these respects.

"In a late case in this court, *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, is fully considered, and the following propositions are said to be established in that case:

" '1. That the payment of duties to the United States gives the right to sell the thing imported and that such right to sell cannot be forbidden or impaired by a state.

" '2. That a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer, "in his warehouse, in the original form or package in which it was imported," is a duty on imports within the meaning of the constitution; and

" '3. That a state cannot, in the form of a license or otherwise, tax the right of the importer to sell; but, when the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the state, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the

products of other countries, but because they are property within the state in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate': *May v. New Orleans*, 173 U. S. 496, 20 Sup. Ct. Rep. 976, 44 L. ed. 1165.

"In *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015, it was held that the tax by the state on the amount of sales of goods made by sales by an auctioneer of imported goods, before incorporation into the general property in the state, was a tax on the goods themselves. Previous cases were reviewed by Mr. Justice Miller, and the result of them stated to be: 'The tax on sales made by an auctioneer is a tax on the goods sold within the terms of this last decision, and, indeed, within all the cases cited; and, when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports.'

"And in the late case of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538, the distinction was pointed out between taxes upon goods imported from abroad—imported in the legal sense—and those sent from another state; as to which latter class of merchandise the states have the power, after the goods reach their destination and are held for sale, to tax them. Whereas, following *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, where goods are imported in the strict sense, they preserve their character as imports so long as they are not sold in the original packages in which they are imported or by the act of the importer incorporated into the general property of the state.

"It may be stated as the result of the decision that, as to imported goods, the state may not impose taxes directly upon the goods or upon the right to sell them, or impose license fees upon importers for the privilege of selling, so long as the goods remain in the original package unincorporated into the general property. All such attempts at taxation are in violation of the constitution and void.

"But in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 195, and in subsequent cases in this court, the principle is recognized, as was stated by Chief Justice Marshall in the original case, that this prohibition in the constitution should be carried 'no further than to prevent the states from doing that which it was the great object of the constitution to prevent'—which was interference with either the collection of duties upon imports or the right of the importer, who has paid duty, to sell the imported goods in the unbroken packages in which they were imported.

"The chief justice instanced the case of the peddler who carried goods unpacked from the original packages for sale through the country, and the case of the importer of plate for his own use, whose privileges did not extend beyond the protection of the right of the importer to sell in the original packages, and whose conduct in refer-

ence to the goods had been such as to destroy their character as original packages and mingle them with the goods and property of the country, and thus, notwithstanding their importation, to make them, for the purpose of taxation, part of the general property of the country and liable to contribute, in consideration of the protection received, to the general welfare, by way of taxes levied for public purposes. This right of taxation by the state was distinctly recognized in *May v. New Orleans*, supra, where the goods imported in the original packages were separated therefrom and placed on the shelves and counters of the importing merchant.

“The exact question in this case is, Has a condition of facts arisen which renders applicable the principle that the thing taxed has lost its distinctive character as an import in such sense that it has become subject to the taxing power of the state?

“The power of the state of New York to impose a tax upon the cash and these notes as capital employed in a business within the state, laying aside for the moment the question as to their character as proceeds of the sale of imports, cannot be doubted in view of the previous decisions of this court. Particularly the recent case of *Metropolitan L. Ina. Co. v. New Orleans*, decided at the last term (205 U. S. 395, 27 Sup. Ct. Rep. 499, 51 L. ed. 853), wherein it was held that those engaged in the business of lending money in a state, being nonresidents of the same, might be taxed upon the capital employed in such business, precisely as the state could tax the capital of its own citizens.

“The constitutional protection, as we have seen, is intended to secure the right to bring in, and to sell in the original packages, the goods imported; and, that this right may not be impaired, direct taxes upon goods or license taxes for the privilege of sale cannot be levied; and the decision in *Brown v. Maryland* recognizes that the importer may lose this right of protection by mingling such goods with other property, and altering their character as importations in original packages, and making them by his conduct subject to the taxing power of the state. And we think the same principle may be applied to the proceeds of the sale of the goods, which, while not directly taxable as such, any more than the goods themselves, may be dealt with by the owner in such wise as to become subject to taxation as other property.

“And we think such a case is presented in the facts now before us. The plaintiffs in error have established a warehouse and place of business in the state of New York for the sale of their imported goods. This business is of a permanent character; the goods are constantly received and sold and replaced by other goods. Cash is deposited in bank in New York, and is subject to use as the needs of the business may require. In this business it takes notes for sales of such goods. These notes are not directly transmitted to its home office in Dublin, but are held for collection in connection with the

business in New York; and while the bulk of the proceeds may be sent abroad, sufficient sums are retained to meet the expenses of the business and pay duties on subsequent importations of goods.

“We think the constitutional protection afforded the importer against state action does not require the property thus held and used to be exempted from state taxation. While it is true that a large proportion of proceeds of the notes after collection are sent to the home office of the plaintiffs in error, they are not taxed in transit as the proceeds of sale of imported goods; for the notes are held in New York for collection, and, when paid, a part of the proceeds are held for other purposes in connection with the business, and the balance remitted to the home office.

“By reason of this course of conduct, we think these proceeds have lost that distinctive character which would give them the right to the protection of the federal constitution under the clause invoked, and the cash taxed and the amount of these notes have become capital invested in business in the state of New York, which business is carried on under the protection of the laws of that state, and, so far as the capital is invested in it, is subject to taxation by the laws of the state.

“We think the court of appeals did not err, and the judgment of the supreme court rendered upon remittitur from the court of appeals is affirmed”: *New York v. Wells*, 208 U. S. 14, 28 Sup. Ct. Rep. 193, 52 L. ed.

CLARK v. ULSTER AND DELAWARE RAILROAD COMPANY.

[189 N. Y. 93, 81 N. E. 766.]

RAILWAYS—Livestock Contract, When does not Merge Previous Negotiations for the Furnishing of a Car.—If, on application to a railway company, it agrees to furnish cars at a date specified for the shipping of livestock, but, failing to do so, it furnishes such cars at a subsequent date and exacts from the shipper what is known as a livestock contract, such contract does not relate to nor merge the prior contract to furnish cars, nor prevent the recovery of damages for not complying with it. (p. 851.)

RAILWAYS, Contract of to Furnish Cars, When Mutual.—If an intending shipper applies to an agent of a railway company for a car in which to make a shipment and the company agrees to furnish it, there arises by implication of law an agreement on the part of such shipper to use the car if furnished, and, in case of not using, to pay whatever loss may have accrued to the company. (p. 852.)

RAILWAYS—Contract to Furnish Cars, When Arises and Effect of.—A shipper's orders calling for a specified number of cars for a specified date will, when accepted by the carrier, constitute a contract

binding on it to furnish the cars and on him to furnish the goods with which to load them. (p. 852.)

RAILWAYS, Station Agents of, Implied Authority to Contract for the Furnishing of Cars.—If an intending shipper applies to the station agent of a railway company for a car to be furnished at a time and for a purpose specified, and the agent answers that the shipper can have the car, a contract is thereby created between the carrier and the shipper upon which the former is answerable in damages on failing to furnish the car as promised. The authority to make the contract is implied as within such agent's employment. (pp. 852, 853.)

Action against the defendant railway company for failure to furnish a car to the plaintiff. Verdict and judgment for the plaintiff, and the judgment was affirmed by the appellate division.

Amos Van Etten, for the appellant.

C. L. Andrus, for the respondent.

95 BARTLETT, J. The plaintiff in this action has recovered a verdict against the defendant for damages sustained by him in consequence of the defendant's breach of a contract whereby it undertook to furnish a car at certain stations upon its line for the shipment by the plaintiff of a lot of livestock to Kingston and thence by the West Shore railroad to the city of New York. The judgment entered upon the verdict has been unanimously affirmed by the appellate division, and the principal question presented by the defendant's appeal to this court is whether the interviews between the plaintiff and the defendant's station agent at the point of 96 shipment constituted an agreement binding upon both parties for the violation of which the defendant is legally liable. According to the testimony of the plaintiff he applied on Monday, June 29, 1903, to Fred More, the station agent of the Ulster and Delaware Railroad Company at Hobart, New York, to furnish a car at that station and Grand Gorge on the ensuing 7th of July for the transportation of cattle to New York. The plaintiff said: "Fred, I want a car for a week from to-morrow." The agent answered: "All right, you can have one." The purpose for which the plaintiff desired the car was expressly stated as being "to ship a car of cattle." On the Wednesday or Thursday succeeding this conversation the plaintiff had a further interview with the station agent, which he narrated as follows: "I told him I wanted to find out whether or not I was going

to have that car sure, and for him to ask the railroad company if I could have it for sure and if I could fill out at Grand Gorge, and he asked them. He telegraphed them. He told me he telegraphed and he said I could have the car and I could fill out down there at Grand Gorge." Acting upon this assurance the plaintiff had the cattle, swine and sheep which he proposed to ship brought to the stations indicated and in readiness to be placed upon the car there on Tuesday, July 7, 1903. The defendant, however, failed to furnish the car, and none was provided until the night of Thursday, the 9th. This was too late to permit the arrival of the stock in New York on a market day in that week. The result of the delay was that the animals were not taken on board until July 14, 1903, on which date the plaintiff was required by the station agent to sign a written agreement in reference to the transportation of the animals commonly denominated a livestock contract. The damages awarded by the jury represent the expense to which the plaintiff was put in caring for the livestock during the week of their detention at the points of shipment and the depreciation in their market value caused by the delay.

The complaint was so framed as to charge the defendant not only upon the express oral contract made through its station ^{or} agent by means of the interviews already narrated, but also upon the obligation of the railroad corporation as a common carrier. The case went to the jury, however, solely upon the issue of an express contract; and the main points argued here in behalf of the appellant are the propositions, first, that the livestock contract in writing merged all the negotiations involved in the interviews of the previous week, and, secondly, that those interviews cannot be held to amount to a contract inasmuch as there was a lack of mutuality.

As to the first proposition it is to be noted that the livestock contract does not relate to the same subject matter as the interviews. The subject matter of the conversation with the station agent was the furnishing of a cattle car at certain specified stations at a specified time for the transportation of the plaintiff's livestock. The subject matter of the livestock contract was the extent of the obligations to be assumed by the Ulster and Delaware Railroad Company after the delivery of the animals to that corporation for conveyance to their destination. This is apparent from the very

beginning of the livestock contract which witnesseth that "the said shipper has delivered to the said carrier livestock" of the kind and number and consigned as indicated in the succeeding part of the document. In other words, the livestock contract spoke only in futuro, and was designed simply and solely to limit the liability of the carrier after the business of transportation had begun. It in no wise referred to the furnishing of the car, nor was there any language therein which could properly be held to have waived or otherwise affected any right which had accrued to the plaintiff in reference to that matter. Indeed, whatever right of action the plaintiff had by reason of the defendant's failure to furnish the car at the time promised by its agent was perfect and complete before the livestock contract was presented to him for signature. An oral contract whereby a railway company undertakes through a station agent to furnish cars for a shipment of livestock at a specified station and at a specified time is not avoided by a written contract signed by the shipper subsequent ⁹⁸ to a breach of the oral contract unless there is in such written contract some consideration moving to the shipper as compensation for the damages already incurred by him: *Gulf etc. Ry. Co. v. House & Watkins* (Tex. Civ. App.), 88 S. W. 1110. No such consideration can be discovered in the livestock contract in the present case: See *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077.

The other point relied upon by the appellant, to wit, that the alleged oral contract was void for want of mutuality, assumes that the request by the plaintiff to the agent of the defendant to furnish the car, followed by the promise of the agent to comply with such request, imposed no legal obligation upon the plaintiff to furnish any stock for shipment, or to compensate the defendant for its trouble and expense in furnishing the car in case he failed to make use of it. That this is the position of the learned counsel for the appellant is made clear by the following question on his brief: "Let us suppose that after this order for a car was given upon its arrival at Hobart on July 7th the plaintiff had then informed the agent that his stock had been sold and he would not ship, could the defendant then have recovered for a breach of the order as given?"

We think there is no doubt that this question must be answered in the affirmative. The request that the car be furnished carried with it, by implication of law, an agree-

ment to make use of it if the request was complied with and a correlative promise to pay to the defendant in the event of nonuser whatever loss it might thereby incur. This obligation is just as clear as would be that of a person who went into a restaurant and ordered a dinner for a party of friends to pay for the meal furnished in accordance with his order, even though he produced no guests to partake of his hospitality. The mere order under such circumstances carries with it the implication of a promise to pay. "Where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of a reward to ^{or} him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him": Wald's Pollock on Contracts, 3d ed., pp. 9, 10. In the case at bar the request by the plaintiff, coupled with the assurance by the agent of the defendant that the car would be furnished, created a relation between the parties to the present action which plainly falls within the doctrine thus stated.

That a shipper's order calling for a specific number of cars for a specified day will, when accepted by a common carrier, constitute a contract binding the carrier to furnish the cars and the shipper to furnish the goods wherewith to load the cars has been expressly decided by the circuit court of the United States (*Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 31 Fed. 864), and by the appellate court of Indiana: *Pittsburg etc. Ry. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853. In the case last cited the court said: "If a shipper's order to a common carrier of livestock for a designated number of cars to be furnished at a station indicated, on a day mentioned in the future, for the transportation of such stock, is accepted by the carrier, such agreement would constitute a contract binding on the company to furnish the cars, and upon the shipper to furnish the stock to load them." Indeed, no case is referred to by the learned counsel for the appellant which questions the legal obligation of a railroad company to perform such a promise as that testified to by the plaintiff in the case at bar. The binding character of such an agreement is recognized by the text-writers and by the courts wherever the question appears to have arisen: "Where a railroad company expressly undertakes by special contract to furnish cars at a specified time, it is bound to perform its contract": 4 Elliott on Railroads,

sec. 1473; Gulf etc. Ry. Co. v. Hume, 6 Tex. Civ. App. 653, 24 S. W. 915; Hoffman H. & S. Co. v. St. Louis, I. M. & S. R. Co., 119 Mo. App. 495, 94 S. W. 597; Wood v. Chicago etc. Ry. Co., 68 Iowa, 491, 56 Am. Rep. 861, 27 N. W. 473; Gulf etc. Ry. Co. v. House & Watkins (Tex. Civ. App.), 88 S. W. 1110. In some cases the implied authority of a station ¹⁰⁰ agent to bind the railroad company by a contract to furnish cars by a certain day has been questioned; but the prevailing doctrine is that such authority will be deemed to be included within the scope of his employment: See Wood v. Chicago etc. Ry. Co., 68 Iowa, 491, 56 Am. Rep. 861, 27 N. W. 473, and Easton v. Dudley, 78 Tex. 236, 14 S. W. 583.

The only objections to the evidence offered to establish the amount of damage suffered by the plaintiff were based solely on the erroneous view that the livestock contract was the only agreement between the parties, and no exceptions were taken to the judge's charge in reference to the measure of damages.

We think that the judgment was right and should be affirmed, with costs.

Gray, O'Brien, Vann, Werner and Chase, JJ., concur.

Cullen, C. J., absent.

Judgment affirmed.

A Railway Station Agent has implied authority to contract to furnish cars for the shipment of perishable property by a specified day: Wood v. Chicago etc. Ry. Co., 68 Iowa, 491, 56 Am. Rep. 861.

A Contract by a Railroad Station Agent on behalf of his company to furnish a shipper certain cars belonging to another company is within the apparent scope of his authority and binding on his principal: Nichols v. Oregon Short Line R. R. Co., 24 Utah, 83, 91 Am. St. Rep. 778.

PEOPLE v. WILLIAMS.

[189 N. Y. 131, 81 N. E. 778.]

CONSTITUTIONAL LAW—Women, Power to Legislate Concerning.—An adult woman is not to be regarded as a ward of the state nor in any other light than a man is regarded when the question relates to a business pursuit or calling. She is entitled to enjoy unmolested her liberty of person and her freedom to work for whom and where and as long as she pleases within the general limits operative on all persons alike. (p. 857.)

CONSTITUTIONAL LAW—Power to Limit Employment of Within Designated Hours.—A statute prohibiting and making criminal the employment or working of women in any factory before 6 o'clock in the morning or after 9 o'clock of the evening of any day is unconstitutional. (pp. 857, 858.)

Prosecution for violating section 3841 of the Penal Code of New York prohibiting the employment of females in any factory at times therein specified. The trial court granted a motion in arrest of judgment on the ground that the statute was unconstitutional, and this action was affirmed on appeal to the appellate division of the first judicial department.

William S. Jackson, attorney general, and Timothy I. Dillon, for the appellant.

Henry B. Corey, for the respondent.

¹³³ GRAY, J. The defendant was arrested and convicted upon the charge of having violated the provisions of section 3841 of the Penal Code. This section makes it a misdemeanor on the part of any person not complying with the provisions of article 6 of the labor law relating to factories. The provision of the labor law now in question is contained in section 77, which is entitled: "Hours of labor of minors and women," and reads that "No minor under the age of eighteen years, and no female shall be employed, permitted or suffered to work in any factory in this state before 6 o'clock in the morning, or after 9 o'clock in the evening of any day; or for more than ten hours in any one day except to make a shorter work day on the last day of the week; or for more than sixty hours in any one week, or more hours in any one week than will make an average of ten hours per day for the whole number of days so worked": Laws 1903, c. 184, sec. 2. The information and the proof were that a female, named Katie Mead, over twenty-one years of age,

was found by the factory inspector at work in a book-binding establishment, in the city of New York, at twenty minutes after 10 o'clock in the evening. There was no complaint with respect to the character or construction of the building, and the defendant's guilt was rested solely upon his failure to observe the provision of the statute against a female being at work after 9 o'clock in the evening. If the inhibition against employing a female in any factory after that hour was a valid act of legislation, then the defendant came within its operation and he was amenable to punishment. After the defendant had been found guilty, the trial court granted his motion in arrest of judgment and discharged him, holding that the legislative enactment was unconstitutional. The justices of the appellate division in the first department, by a divided vote, have affirmed the order of the trial court.

In my judgment, the determination below was correct. I think that the legislature, in preventing the employment of an adult woman in a factory, and in prohibiting her to work therein before 6 o'clock in the morning or after 9 ¹³⁴ o'clock in the evening, has overstepped the limits set by the constitution of the state to the exercise of the power to interfere with the rights of citizens. The fundamental law of the state, as embodied in its constitution, provides that "no person shall . . . be deprived of life, liberty or property without due process of law": Art. 1, sec. 6. The provisions of the state and of the federal constitutions protect every citizen in the right to pursue any lawful employment in a lawful manner. He enjoys the utmost freedom to follow his chosen pursuit and any arbitrary distinction against or deprivation of that freedom by the legislature is an invasion of the constitutional guaranty. Under our laws men and women now stand alike in their constitutional rights, and there is no warrant for making any discrimination between them with respect to the liberty of person or of contract. It is claimed, however, in this case that the enactment in question can be justified as an exercise of the police power of the state, having for its purpose the general welfare of the state in a measure for the preservation of the health of the female citizens. It is to be observed that it is not a regulation of the number of hours of labor for working women; the enactment goes far beyond this. It attempts to take away the right of a woman to labor before 6 o'clock in the morning or after 9 o'clock in the evening, without any reference to other

considerations. In providing that "no female shall be employed, permitted or suffered to work in any factory in this state before 6 o'clock in the morning or after 9 o'clock in the evening of any day," she is prevented, however willing, from engaging herself in a lawful employment during the specified periods of the twenty-four hours. Except as to women under twenty-one years of age, this was the first attempt on the part of the state to restrict their liberty of person, or their freedom of contract, in the pursuit of a vocation. I find nothing in the language of the section which suggests the purpose of promoting health, except as it might be inferred that for a woman to work during the forbidden hours of night would be unhealthful. If the inhibition ¹³⁵ of the section in question had been framed to prevent the ten hours of work from being performed at night, or to prolong them beyond 9 o'clock in the evening, it might more readily be appreciated that the health of women was the matter of legislative concern. That is not the effect nor the sense of the provision of the section, with which alone we are dealing. It was not the case upon which this defendant was convicted. If this enactment is to be sustained, then an adult woman, although a citizen and entitled as such to all the rights of citizenship under our laws, may not be employed, nor contract to work, in any factory for any period of time, no matter how short, if it is within the prohibited hours; and this, too, without any regard to the healthfulness of the employment. It is clear, as it seems to me, that this legislation cannot, and should not, be upheld as a proper exercise of the police power. It is certainly discriminative against female citizens in denying to them equal rights with men in the same pursuit. The courts have gone very far in upholding legislative enactments, framed clearly for the welfare, comfort and health of the community, and that a wide range in the exercise of the police power of the state should be conceded, I do not deny; but when it is sought under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judg-

ments, when invoked, to protect against legislative acts plainly transcending the powers conferred by the constitution upon the legislative body.

In this section of the labor law it will be observed that women are classed with minors under the age of eighteen years, for which there is no reason. The right of the state, as *parens patriae*, to restrict or to regulate the labor and employment of children is unquestionable; but an adult female is not to be ¹⁸⁶ regarded as a ward of the state, or in any other light than the man is regarded, when the question relates to the business pursuit or calling. She is no more a ward of the state than is the man. She is entitled to enjoy, unmolested, her liberty of person, and her freedom to work for whom she pleases, where she pleases and as long as she pleases, within the general limits operative on all persons alike, and shall we say that this is valid legislation, which closes the doors of a factory to her before and after certain hours? I think not. Without extended reference to the cases bearing upon the much discussed subject of the exercise of the police power, I need only refer to the recent case of *Lochner v. State*, 198 U. S. 45, where the supreme court of the United States had before it a case arising in this state under a provision of the labor law, which restricted the hours of labor for the employés of bakers. The argument there was, and it had prevailed in this court, that the legislation was valid as a health law under the police power; but the federal supreme court refused to recognize the force of the argument, and held, if such legislation could be justified, that constitutional protection against interference with the liberty of person and the freedom of contract was a visionary thing. It was held that bakers "are in no sense wards of the state. Viewed in the light of a pure labor law, with no reference whatever to the question of health, . . . the law . . . involves neither the safety, the morals nor the welfare of the public, and the interest of the public is not in the slightest degree affected by such an act." It was also observed that "there must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty."

So I think, in this case, that we should say, as an adult female is in no sense a ward of the state, that she is not to be made the special object of the exercise of the paternal power of the state, and that the restriction here imposed upon her

privilege to labor violates the constitutional guaranties. In the gradual course of legislation upon the rights of a woman¹³⁷ in this state, she has come to possess all the responsibilities of the man, and she is entitled to be placed upon an equality of rights with the man.

It might be observed that working in a factory in the night hours is not the only situation of menace to the working woman; but such occupation is, arbitrarily, debarred her.

For these reasons, I advise that the order appealed from should be affirmed.

Cullen, C. J., Edward T. Bartlett, Haight, Vann, Willard Bartlett and Hiscock, JJ., concur.

Order affirmed.

The Legislature is Competent to Forbid the Employment of females more than ten hours a day in any factory, laundry or mechanical establishment: State v. Muller, 48 Or. 252, 120 Am. St. Rep. 805; and it is also within the police power of a state to fix an age limit below which boys shall not be employed: Lenahan v. Pittston Coal Min. Co., 218 Pa. 311, 120 Am. St. Rep. 885.

AMSINCK v. ROGERS.

[189 N. Y. 252, 82 N. E. 134.]

FOREIGN BILLS OF EXCHANGE—Conflict of Laws.—The rights and obligations of the drawer of a bill of exchange are determined and fixed by the law of the place where he draws and transfers it, and he is discharged by the failure to protest it in accordance with the laws of that place, although such failure is due to different laws and customs prevailing in the country where the bill is payable. (p. 862.)

BILLS OF EXCHANGE.—The Contracts of the Different Parties to a Bill of Exchange are Independent, and carry different obligations. The drawer does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, and on default of such payment upon due notice, to reimburse the holder in principal and damages at the place where the contract was entered into. (p. 862.)

BILLS OF EXCHANGE, Foreign, by What Law Governed.—The Contract of the Drawer of a Bill of Exchange is regarded as made at the place where it is drawn, and it is governed by the law of that place in regard to the payee and any subsequent holder as to its form and nature, obligation and effect. (p. 862.)

BILLS OF EXCHANGE, Foreign, in What Respect Governed by Foreign Laws.—A bill of exchange drawn in one country and pay-

able in another is, as to its days of grace, the manner of making protest and the person by whom protest may be made, governed by the laws of the country where drawn. As to the necessity of making demand and protest and the circumstances under which the same may be required or dispensed with, a bill of exchange is governed by the law of the country where it was drawn rather than that of the country where it is payable. (p. 862.)

BILL OF EXCHANGE, Foreign, What is.—A bill or order for the payment of money drawn in one country upon a business house in another is a foreign bill of exchange according to the laws of New York, and not a check. (p. 869.)

BILLS OF EXCHANGE, Foreign, When Deemed to be Controlled by the Laws of the Country Where Drawn.—Where a bill of exchange or order for the payment of money is drawn, negotiated and transferred by a house or firm doing business in New York, but directed to a house or firm doing business in Austria, the writing must, as to its character and obligation, be judged by the laws of New York. (p. 869.)

Charles Oakes, for the appellants.

Martin Conboy, for the respondents.

254 HISCOCK, J. Appellants brought this action as holders of a certain instrument for the payment of money drawn by the respondents to their own order upon parties in Austria, and then indorsed and delivered for value to the appellants. The bill of exchange, as we shall for the present denominate it, was not paid by the drawees, and thus far recovery against the drawers has been refused upon the ground that there was no proper protest and notice of protest.

The material facts are not disputed, and the only questions presented for our consideration upon this appeal arise in connection with the rejection by the trial court of certain evidence of Austrian laws, and usages offered for the purpose of excusing protest and notice thereof.

255 Respondents were iron merchants doing business in the city of New York, and appellants were bankers doing business in the same place. The former made a sale of iron to Messrs. A. Herm. Fraenckl Soehne, of Vienna, Austria, and against said sale drew the instrument in question, which reads as follows:

New York, Jan. 8, 1901.

“Exchange for £2,058 6/8.

“On demand of the original cheque (duplicate unpaid) pay to the order of Rogers, Brown & Company, Twenty-two hundred and fifty-eight pounds 6/8, payable at rate for bankers

cheques on London value received and charge the same to account of pig-iron per S.S. Quarnero.

“ROGERS, BROWN & CO.

“To Mess. A. HERM. FRAENCKL SOEHNÉ,

“Ruepgasse, Vienna,

“Austria.

“No. 75.”

This bill was drawn and indorsed and transferred to appellants in New York. There was delay in the shipment of the iron, so that when the consignees and drawees of the bill were notified thereof, they refused to carry out their purchase thereof unless an allowance was made, and this condition was complied with by respondents.

January 8, 1901, the bill was forwarded by the appellants to Vienna for collection, where it was received January 22d. It was presented to the drawees on the same day, but the collecting agent was requested by the latter not to present it at that time, because there were certain differences then existing between them and the drawers concerning the iron in question which probably would be adjusted in a short time. The agent thereupon withdrew the bill and it was not protested and the respondents were not notified of the presentment and nonpayment. January 28, 1901, the bill was again presented by the agent to the drawees and payment again demanded, when practically the same request was made that presentment be withdrawn and the same process be repeated, there being no ²⁵⁶ protest and no notification of presentment and nonpayment being given to respondents. February 12, 1901, the bill was again presented and payment formally demanded, which was refused, but no protest was made and no notice given to the respondents, except that on February 18th, appellants' London agent, who had been advised of the presentment on February 12th, cabled information thereof and of the refusal to pay, and upon the same day appellants by letter advised respondents thereof. February 21, 1901, in response to instructions from New York, the bill was presented to the drawees, payment demanded and refused and protest made, and with what we shall assume to have been proper diligence appellants thereafter and on March 11, 1901, mailed to respondents the notice of protest that day received through their agents, the respondents promptly taking the position that they were discharged for lack of proper protest.

As bearing upon the merits of respondents' position, it appears that the steamer carrying the iron arrived in Genoa February 20th, and that at that time the iron in question could have been sold at that place by the respondents at the same price at which it had been sold to the purchasers in Vienna if the bill had been promptly protested. Upon arrival in Austria, the purchasers refused to accept the iron and it was sold for the sum of five thousand seven hundred and thirty-eight dollars and thirty-eight cents for the benefit of whoever might be concerned, leaving an unpaid balance upon the bill of four thousand three hundred and sixty-four dollars and forty-five cents.

It is practically conceded by the learned counsel for the appellants that if the latter's obligation to cause protest and notice of protest of this bill is to be measured by the laws of New York, where it was drawn and transferred by respondents, there has been a failure of necessary steps which prevents a recovery. Recognizing this, he sought, as already suggested, to introduce evidence establishing a different and less rigorous obligation upon the part of the appellants. This evidence was to the general effect that in Austria, where the same was payable, the instrument involved was not a bill of exchange nor a check, but a "commercial order" for the ²⁵⁷ payment of money which was negotiable and which might be presented as often as occasion arose, each presentment being legally good as any other, and no protest or notice of dishonor to the drawer being required.

In connection with the rejection of this testimony, which presents the only questions upon this appeal, appellants' counsel has seemed to argue the proposition, broader than the evidence offered, that the rights of the drawer of a bill of exchange to protest and notice are governed by the laws of the place where the bill is payable, upon the assumption that in this case such view would excuse the omissions complained of by respondents.

We shall first discuss this general proposition so urged and, as we believe, shall demonstrate that the weight of authority is that the rights and obligations of the drawer of a bill of exchange are determined and fixed by the law of the place where he draws it, and, as in this case, transfers it, and that he is discharged by failure to protest the same in accordance with the laws of that place, such failure being due to differ-

ent laws or customs prevailing in the country where the bill is payable.

It is familiar law that the contracts of the different parties to a bill of exchange are independent and carry different obligations. The drawer of such a bill does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, and agrees, in default of such payment, upon due notice, to reimburse the holder in principal and damages at the place where he entered into the contract.

His contract is regarded as made at the place where the bill is drawn, and as to its form and nature and the obligation and effect thereof is governed by the law of that place in regard to the payee and any subsequent holder: Story on Bills of Exchange, secs. 131, 154. While, as to certain details, such as the days of grace, the manner of making the protest, and the person by whom protest shall be made, the law or custom of the place where it is payable will govern, ²⁵⁸ the necessity of making a demand and protest and the circumstances under which the same may be required or dispensed with are incidents of the original contract which are governed by the law of the place where the bill is drawn rather than of the place where it is payable. They constitute implied conditions upon which the liability of the drawer is to attach according to the *lex loci contractus*: Story on Bills of Exchange, secs. 155, 175.

These principles have been affirmed and enunciated by so many decisions that it would be out of place to attempt a general review of the latter, and citation may be made simply of the following cases outside of this state: *Powers v. Lynch*, 3 Mass. 77, 80; *Potter v. Brown*, 5 East, 124; *Price v. Page*, 24 Mo. 65; *Hunt v. Standart*, 15 Ind. 33, 38, 77 Am. Dec. 79; *Raymond v. Holmes*, 11 Tex. 54, 59; *Allen v. Kemble*, 6 Moore P. C. 314.

Since, however, it is contended by the learned counsel for the appellants that the views expressed by Story are in direct opposition to the decisions in this state, a somewhat more extended reference will be made to the latter, and with the result, we apprehend, of quite conclusively demonstrating that the current of their authority has been misjudged.

In *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137, a bill of exchange was drawn in the French West Indian islands on a mercantile house in Bordeaux, and was indorsed and

transferred in the state of New York, action being there brought upon the bill by the indorsees. The material question arising in the case was whether the steps necessary on the part of the holders of the bill to hold the indorsers upon default of the drawees to accept should be determined by the French law or the law of New York, where the indorsement was made, and it was held that while the payee of the bill was bound to present it for acceptance and payment according to the law of France, as it was drawn and payable in French territories, the indorsee stood upon a new and independent contract, the indorsement being equivalent in effect to the drawing of a bill, and that this indorsement having taken place in New York, the obligation of the indorser and the rights of the indorsee were to ²⁵⁹ be measured by the laws of that state rather than of the place where the bill was payable, and that this being so, it was unnecessary to take certain steps in order to hold the indorser, which would have been necessary under the law of the place where the bill was payable. The court said: "That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made has been adjudged both here and in England. . . . The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this state; and it is, therefore, to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn are equally applicable to the indorser; for, in respect to the holder, he is a drawer. . . . Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is, therefore, to be presumed that the parties had reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of

the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition."

Allen v. Merchants' Bank of New York, 22 Wend. 215, 34 Am. Dec. 289, was an action of assumpsit brought to recover the amount of a bill of exchange drawn in New York on a mercantile house in Philadelphia and deposited by the plaintiff with the defendant ²⁶⁰ for collection and which was lost to the plaintiff in consequence of the omission to give notice of nonacceptance to the indorsers. It was held that the judgment in favor of the defendant should be reversed; that it did not excuse the bank from giving notice of the nonacceptance of the bill because by the law merchant of the place where the bill was presented, notice of nonacceptance was deemed unnecessary, but that, on the contrary, as the *lex loci contractus* governed in such a case, it was the duty of the bank to have caused proper notice to be given in accordance with the law prevailing where the bill was drawn. In the majority opinion, the rule laid down by Story and above quoted as to the necessity of making a demand and protest is quoted with approval.

In *Carroll v. Upton*, 2 Sand. 171, affirmed, 3 N. Y. 272, it was held that in the case of a bill drawn at Washington on a house in New Orleans, the law of the place where the bill was drawn governed as to the notice of nonacceptance and of nonpayment necessary to be given in order to charge the drawer, and that evidence of a different usage prevailing at the place where the drawee resided and the bill was presented would not be admitted to control the drawer's liability.

The case of *Artisans' Bank v. Park Bank*, 41 Barb. 599, was an action to recover from the defendants the amount of a promissory note deposited with them for collection, on the ground of a failure to protest and duly notify the indorsers of nonpayment. The indorsement was made in New York. The note was payable in Alabama. When the same became payable it was presented for payment, which was refused, and the note was not protested and the indorser was not notified of its nonpayment. It was claimed on the trial that the Alabama statute did not require the indorser of such a note to be notified of nonpayment; also, that the note was not a negotiable promissory note, and, therefore, the indorsers were guarantors and not indorsers. The court ruled against

these contentions, however, holding that the indorsement was a New York contract and governed by the laws of New ²⁶¹ York that by the indorsement the indorsers in effect contracted to pay the note in New York if upon its being duly presented for payment in Alabama payment was refused and they were duly notified of demand of payment and refusal, and that these acts not having been performed, the indorsers were discharged.

In *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207, 39 Am. Rep. 652, Judge Danforth, speaking of the obligations of an indorser of a draft which, as before stated, are regarded as equivalent to those of a drawer, says: "What, then, was his engagement? As indorser it was, in general terms, to pay the draft to any holder for value whose title was derived through the payee, provided it was duly presented to the drawee, payment refused by it and due notice of the nonpayment given to him."

Counsel for appellants especially relies upon two cases to sustain his proposition that the rules laid down by Story have not been adopted in this state.

The first of these cases is that of *Everett v. Vendryes*, 19 N. Y. 436. This was an action by the indorsee against the drawer of a bill of exchange drawn in New Granada upon a corporation having its office in this state. It was payable to the order of one Jimines, indorsed by him at Cartagena, and was protested for nonacceptance. The answer denied the indorsement of Jimines in general terms. The plaintiffs claimed to be the indorsees according to the legal effect of the bill. The indorsement was not good and sufficient according to the laws of New Granada, but was so according to those of New York. The question, therefore, was whether, for the purpose of bringing an action against the drawer of the bill upon nonacceptance by the drawee in New York state, the indorsement was to be tested by the laws of New Granada, where it was made, or by the laws of New York, where the bill was payable. It was held that the laws of New York should govern, and Judge Denio, in writing for the court, said: "I have not been able to find any authority for such a case, but I am of opinion that upon the reason of the thing the laws of this state should be held to control. ²⁶² These laws are to be resorted to in determining the legal meaning and effect and the obligations of the contract. All

the cases agree in this. In this case the point to be determined was, whether the plaintiffs were indorsees and entitled to receive the amount of the bill of the drawees. This was to be determined, in the first instance, when the bill was presented for acceptance and payment in New York. The plaintiff's title was written on the bill. The question was, whether it made them indorsees according to the effect of the words of negotiability contained in the bill itself. Those words and the actual indorsement were to be compared, and the legal rules to be employed in making that comparison were found in the law-merchant of the state of New York; and by those rules the indorsement was precisely such a one as the bill contemplated. Besides, it is reasonable to suppose that, in addressing this bill to the drawees of New York, the defendant contemplated that they would understand the words of negotiability according to the law of their own country. When, therefore, he directed the drawees to pay to the order of the payee, he must be intended to contemplate that whatever would be understood in New York to be the payee's order was the thing which he intended by that expression in the bill." In other words, it was held that the indorsement was made for the purpose of enabling the indorsee to present and collect the note in New York, and that an indorsement which was effective for that purpose under the laws of the state where performance would be sought was sufficient. It does not seem to us that this decision in any way conflicts with those to which we have already referred. It is true that the learned judge commences his opinion with some general observations as to the principles conceived to be applicable in ascertaining the nature and interpretation of a bill of exchange. Such observations, however, constituted nothing more than a dictum, and were not sufficient in our opinion to outweigh the authorities to which we have already referred.

The case of *Hibernia Nat. Bank v. Lacombe*, 84 ²⁶³ N. Y. 367, 38 Am. Rep. 518, involved consideration of a draft drawn in New Orleans upon New York bankers. The case was disposed of upon the theory that the instrument was a check, which of course was the fact, and the obligations of the drawer of a check, as stated in the opinion, are entirely different from those of the drawer of a bill of exchange. The former undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will be

paid to the holder when the check is presented, and if not so paid, and he is notified, he becomes absolutely bound to pay the amount at the place named. In other words, the drawer of a check contracts to pay at the place where the check is payable, instead of, as the drawer of a bill of exchange does, at the place where the instrument is drawn. It is not, therefore, in conflict with our views to hold that the rights of the parties in the case of such a check should be determined by the laws of the place of payment; in other words, the place of performance by the drawer.

Our attention is also called to the case of *Union Nat. Bank of Chicago v. Chapman*, 169 N. Y. 538, 88 Am. St. Rep. 614, 62 N. E. 672, 37 L. R. A. 513, but we do not think that what is there said conflicts with the views we have expressed. In speaking of the general rules governing the construction of a contract it is said: "All matters connected with its performance, including presentation, notice, demand, etc., are regulated by the law of the place where the contract by its terms is to be performed."

In the first place, if we have correctly measured the weight of authority, it establishes the proposition that respondents' contract as drawers was to be performed in New York, where the bill was drawn, and, therefore, the rule quoted, if applicable, would lead to the conclusion that demand and protest so far as they were concerned would be governed by the laws of New York.

In the second place, the question involved in the *Chapman* case was not at all akin to that presented here, and we do not believe that the judge there writing intended to approve the rule that as against drawers in New York of a bill of ²⁶⁴ exchange entire omission of protest might be justified by local customs and usages in a foreign country. We think that he had in mind certain comparatively inconsequential details of the manner and method of making demand and protest, and which, as we have already seen, may be affected by local custom and usage, rather than the entire omission of these important acts. This estimate of what was intended is confirmed by the case of *Scudder v. Union Nat. Bank*, 91 U. S. 406, 412, 22 L. ed. 245, which is especially cited as an authority for what was being said.

In the latter case it is written: "The rule is often laid down that the law of the place of performance governs the contract. . . . For the purposes of payment and the inci-

dents of payment this is a sound proposition. Thus, the bill in question is in law a sight draft. Whether a sight draft is payable immediately upon presentation or whether days of grace are allowed, and to what extent, is differently held in different states. The law of Missouri, where this draft is payable, determines that question in the present instance. The time, manner and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (citations), are points connected with the payment of the bill, and are also instances to illustrate the meaning of the rule that the place of performance governs the bill."

Thus far we have assumed that the instrument in suit was a bill of exchange, but we have also considered whether the drawer's right to protest and notice were governed by the laws of Austria as though such laws would govern such an instrument if otherwise applicable under the principles which have been discussed. As a matter of fact, however, the appellants would not be benefited if we should hold in this connection that the laws of Austria did control in certain cases, for no evidence was received or offered that the drawers of a bill of exchange would not be entitled to the same protest and notice under the laws of that country as under those of New York.

Appellants' only excuse for the omission of these steps ²⁶⁵ rests upon the final proposition that this is not a bill of exchange at all or even a check, but is what is known in Austria as a "commercial order" for the payment of money of which no protest need be made. Support for this proposition, it is said, would have been found in the rejected evidence which would have established as the Austrian law that a bill of exchange must be so designated in the body of the instrument itself, and that such designation by mere superscription as was found upon the instrument in suit is not sufficient.

Therefore, on a close and final analysis of appellants' argument, it is indispensable that they should convince us that their rejected evidence would have established that this was not to be regarded as a bill of exchange, but as a commercial order. We shall assume that under the Austrian law it was a commercial order. On the other hand, there is no doubt, and in fact it is not denied by the learned counsel for the

appellants, that it was a bill of exchange under the laws of the state of New York.

The negotiable instruments law (Laws 1897, c. 612, as amended) provides as follows:

“Section 210. Bill of Exchange Defined.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed determinable future time a sum certain in money to order or to bearer.”

“Section 213. Inland and Foreign Bills of Exchange.—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.”

“Section 321. Check Defined.—A check is a bill of exchange drawn on a bank payable on demand.”

It sufficiently appears that this bill was drawn upon a business house and not a check. It was, therefore, a foreign bill of exchange according to the laws of New York.

And so again we are confronted with the inquiry whether ²⁶⁶ the rights of these respondents as to the nature of this instrument shall be measured by the laws of New York or by those of Austria. It seems to us clear that it must be the former. The parties had their places of business in New York. The bill was there drawn and negotiated and transferred to the appellants. The contract of the respondents was executed and consummated there, and, as we have already seen, was to be performed there upon default of the drawees. The law of New York surrounded the parties and the execution of their contract, and in our judgment it would be not only erroneous, but highly unreasonable, to hold that they contracted with reference to any law other than that of New York, or intended that their contract should be other than that which such law made it—a bill of exchange. The authorities which already have been cited with reference to the contract and rights of the drawer of a bill of exchange are amply sufficient to sustain this view.

Lastly, it is suggested that the decision which we are making will impose much trouble and responsibility upon those who are held for the proper demand and protest of paper in foreign countries where commercial laws and usages differ from our own. We do not see much balance of weight in

favor of this argument even if it is to be considered. In a case like this there would be no great difficulty in forwarding with the bill instructions for its proper protest such as were finally given. Some such precautions would not be more erroneous than would those otherwise imposed upon a party to a New York bill of ascertaining the law of the foreign country where it was payable, in order that he might learn in what manner the rights secured to him where his contract was made would be altered and perhaps materially impaired.

Therefore, we conclude that no error was committed to the prejudice of appellants, and that the judgment appealed from should be affirmed, with costs.

Cullen, C. J., O'Brien, Edward T. Bartlett, Haight and Chase, JJ., concur.

Vann, J., dissents.

Judgment affirmed.

The Liability of a Person on a Promissory Note is generally governed by the law of the place where it is executed, unless it is made payable elsewhere, but matters pertaining to the enforcement of the remedy are governed by the law of the forum: *Clark v. Eltinge*, 38 Wash. 376, 107 Am. St. Rep. 858; *Bailey v. Devine*, 123 Ga. 653, 107 Am. St. Rep. 153; *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 111 Am. St. Rep. 717; *Barrett v. Dodge*, 16 R. I. 740, 27 Am. St. Rep. 777; *Bigelow v. Burnham*, 83 Iowa, 120, 32 Am. St. Rep. 294.

The Law of the Place Where an Action is Brought determines what is evidence of presentment and dishonor of promissory notes and inland bills of exchange: *Corbin v. Planters' Nat. Bank*, 87 Va. 671, 24 Am. St. Rep. 673.

That the Rights of the Holder of a Bill Drawn in One State and payable in another are governed by the law of the latter, see *Coffman v. Bank of Kentucky*, 41 Miss. 212, 90 Am. Dec. 371; and that the law of the state in which a bill is drawn and indorsed governs as to protest and notice to charge indorser, see *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289.

WHAT LAW GOVERNS WITH RESPECT TO DEMAND, PROTEST AND NOTICE OF DISHONOR OF A FOREIGN BILL OF EXCHANGE.

- I. General Principles Involved, 871.
- II. Time of Payment—Days of Grace, 872.
- III. Demand, Protest and Notice.
 - a. Law Governing Necessity of Demand and Protest, 872.
 - b. Law Governing Time, Manner and Sufficiency of Demand and Protest, 876.
 - c. Law Governing Necessity of Notice of Dishonor, 878.
 - d. Law Governing Time, Manner and Sufficiency of Notice of Dishonor, 878.

I. General Principles Involved.

In *Scudder v. Union National Bank*, 91 U. S. 406, 23 L. ed. 245, the supreme court of the United States has laid down the following rules with reference to contracts, when conflict in laws arise: 1. That matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where the contract is made; 2. That matters connected with the performance of a contract are regulated by the law of the place where the contract by its terms is to be performed; 3. That matters relating to procedure depend upon the law of the forum. These rules have been generally adopted by all the courts in determining what law shall govern in regard to foreign bills of exchange. But they have been found difficult of application, because contracts of the class under consideration present features wanting in many other contracts—certain conditions precedent, such as demand, protest and notice of dishonor—all of which conditions, from the very nature of the case, must be performed at a place different from the one where the contract was made. Consequently, complications often arise in applying the second rule above stated, for while the acceptor of a bill undoubtedly contracts to pay at the place of acceptance or at the place fixed for the payment, all the authorities agree that his contract is separate and distinct from that of the drawer or indorser, and adopt the rule laid down in *Daniel on Negotiable Instruments*, volume 1, section 898: "The drawer of a bill does not bind himself to pay it specially where the acceptor is impliedly or expressly called on to pay it, but his contract is to pay generally, and is consequently construed to be a contract to pay at the place where the bill is drawn." The obligation of the drawer or indorser of a bill is conditional that if the bill is dishonored and due notice thereof given, they will pay the bill at the place of their contract—that is, where the bill was drawn or indorsed. Hence, in determining the ultimate liability of the drawer or indorser of a foreign bill complications have arisen in applying the second rule laid down in *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, with reference to these conditions precedent. Nor is the difficulty in applying the rule to these conditions precedent at all surprising when we consider, first, that protest is indispensable as to the dishonor of a foreign bill of exchange; second, that there can, of course, be no protest until payment has been demanded and refused; third, that there can be no demand until the bill has matured; and lastly, that nearly every country has a different custom or law-merchant as to days of grace. And as the date of demand is necessarily fixed by the date of maturity, it follows that in determining the time in which demand for payment of a foreign bill is to be made, recourse must be had to the law of the place on which the bill is drawn, rather than the law of the place where it is drawn. This has led to much conflict of opinion with reference to the sufficiency of demand and notice, as we shall hereafter see.

II. Time of Payment—Days of Grace.

As the time when a bill matures manifestly relates to matters of performance, it falls within the second rule laid down in *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, and is governed by the law of the place where the bill is payable, and not the law of the place where it is drawn or indorsed. On this proposition the authorities are practically unanimous, but we cite a few cases where the doctrine is clearly stated: *Thorp v. Craig*, 10 Iowa, 461; *Cribbs v. Adams*, 13 Gray (Mass.), 597; *Burnham v. Webster*, 19 Me. 232; *Bank of Orange County v. Colby*, 12 N. H. 520; *Bowen v. Newell*, 13 N. Y. 290, 64 Am. Dec. 550; *Amsinck v. Rogers*, 189 N. Y. 252, ante, p. 858, 82 N. E. 134, 12 L. R. A., N. S., 875; *Pawcatuck Nat. Bank v. Barber*, 22 R. I. 73, 46 Atl. 1095; *Bryant v. Edson*, 8 Vt. 325, 30 Am. Dec. 472; *Blodgett v. Durgin*, 32 Vt. 361; *Walsh v. Dart*, 12 Wis. 709; *Second Nat. Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

III. Demand, Protest and Notice.

a. **Law Governing Necessity of Demand and Protest.**—It is settled by the great weight of authority that the necessity of demand and protest as a condition precedent of holding the drawer or indorser of a foreign bill is governed by the law of the place where the bill is drawn or indorsed: *Crawford v. Branch Bank*, 6 Ala. 12, 41 Am. Dec. 33; *Greathead v. Walton*, 40 Conn. 226; *Bond v. Bragg*, 17 Ill. 69; *Belford v. Bangs*, 15 Ill. App. 76; *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Thorp v. Craig*, 10 Iowa, 461; *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244; *Young v. Harris*, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170; *Piner v. Clary*, 17 B. Mon. (Ky.) 645; *Powers v. Lynch*, 3 Mass. 76; *Glidden v. Chamberlin*, 167 Mass. 486, 57 Am. St. Rep. 479, 46 N. E. 103; *Price v. Page*, 24 Mo. 65; *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Carroll v. Upton*, 2 Sand. (N. Y.) 171, affirmed 3 N. Y. 272; *Artisans' Bank v. Park Bank*, 41 Barb. 599; *Amsinck v. Rogers*, 189 N. Y. 252, ante, p. 858, 82 N. E. 134, 12 L. R. A., N. S., 875; *Warner v. Citizens' Bank*, 6 S. D. 152, 60 N. W. 746; *Green v. Bond*, 37 Tenn. (5 Sneed) 328; *Raymond v. Holmes*, 11 Tex. 54; *Nichols v. Porter*, 2 W. Va. 13, 94 Am. Dec. 501; *Musson v. Lake*, 4 How. (U. S.) 262, 11 L. ed. 967.

But some of the cases cited above, going further than the rule stated, hold that the necessity of making demand and protest and giving notice of dishonor, and the circumstances under which the same may be required or dispensed with, in order to hold the drawer or indorser, are governed by the law of the place where the bill is drawn or indorsed. These cases do not dispute the rule that in matters of performance a contract is to be determined by the law of the place where it is to be performed, but insist that demand, protest and the notice of dishonor and the circumstances under which the same may be required or dispensed with are coincidents of the original

contract, and that the drawer or indorser of a foreign bill does not contract to pay at the place upon which the bill is drawn, but only guarantees its acceptance and payment there by the drawee, and agrees that upon default of such payment by the drawee the drawer or indorser will, upon due notice, reimburse the holder at the place where their respective contracts were made. In other words, that the place of performance is the place where the contract is drawn or indorsed. Thus, in *Amsinck v. Rogers*, 189 N. Y. 252, ante, p. 858, 82 N. E. 134, 12 L. R. A., N. S., 875, it was held that the drawer and indorser of a foreign bill of exchange was discharged by reason of a failure to protest the same in accordance with the law of the place where the bill was drawn, though such failure was due to the different laws prevailing in the country where the bill was payable. In this case the bill was drawn in the city of New York on a firm in Vienna, Austria, and was indorsed and transferred in New York to certain brokers in that city, by whom it was forwarded to Vienna for collection. Though it was presented on the day of its receipt in Vienna, at the request of the drawee, presentation was withdrawn and the bill was not protested. Six days afterward the bill was again presented and payment demanded, but the presentment was again withdrawn at the drawee's request, and no protest made or notice given. Two weeks later payment was again demanded and refused, and nine days thereafter another demand made, and upon refusal to pay, the bill was protested for nonpayment and notice of dishonor given. In an action by the holder against the drawer and indorser, it was conceded by the plaintiff that if the obligation to cause protest and notice of protest was to be governed by the laws of New York where the bill was drawn and transferred, no recovery could be had against the indorsers, but he sought to prove that in Austria, where the bill was payable, the instrument in question was known as a "commercial order," which might be presented as often as occasion arose, each presentment being legally as good as any other, and that no protest or notice of dishonor was required by the laws of that country. In holding that the drawer and indorser was discharged the court said: "It is familiar law that the contracts of the different parties to a bill of exchange are independent and carry different obligations. The drawer of such a bill does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, and agrees, in default of such payment, upon due notice, to reimburse the holder in principal and damages at the place where he entered the contract. His contract is regarded as made at the place where the bill is drawn, and as to its form and nature and the obligation and effect thereof is governed by the law of that place in regard to the payee and any subsequent holder (citing *Story on Bills of Exchange*, secs. 131-154). While as to certain details, such as the days of grace, the manner of making the protest, and the person by whom protest shall be made, the law or custom of the place where it is payable will govern, the necessity of making

a demand and protest and the circumstances under which the same may be required or dispensed with are coincidents of the original contract which are governed by the law of the place where the bill is drawn rather than that of the place where it is payable, they constitute implied conditions upon which the liability of the drawer is to attach according to the *lex loci contractus*'' (citing Story on Bills of Exchange, secs. 155-175).

In speaking of the contention that the instrument was not a bill of exchange but a "commercial order," the court continued: "It sufficiently appears that this bill was drawn upon a business house, and was not a check. It was therefore a foreign bill of exchange according to the laws of New York. And so again we are confronted by the inquiry whether the rights of these respondents as to the nature of this instrument shall be measured by the laws of New York or by those of Austria. It seems to us clear that it must be the former. The parties had their places of business in New York. The bill was there drawn and negotiated and transferred to the appellants. The contract of the respondents was executed and consummated there, and, as we have already seen, was to be performed there upon default of the drawers. The law of New York surrounded the parties and the execution of their contract, and in our judgment it would be not only erroneous, but highly unreasonable, to hold that they contracted with reference to any law other than that of New York, or intended that their contract should be other than that which such law made it—a bill of exchange. . . . It is contended that the decision which we are making will impose much trouble and responsibility upon those who are held for the proper demand and protest of paper in foreign countries where commercial law and usages differ from our own. We do not see much balance of weight in favor of this argument, even if it is to be considered. In a case like this there would be no great difficulty in forwarding with the bill instructions for its proper protest such as were finally given. Some such precautions would not be more onerous than would those otherwise imposed upon a party to a New York bill of ascertaining the law of a foreign country where it was payable, in order that he might learn in what manner the rights secured to him where his contract was made would be altered and perhaps materially impaired."

In *Green v. Bond*, 37 Tenn. (5 Sneed) 328, the general questions raised in the foregoing case were discussed, and the reasoning of the court was along the same lines as those just given, and the language equally as strong. In *Warner v. Citizens' Bank*, 6 S. D. 152, 60 N. W. 746, the payee of two drafts drawn on a bank in the state of Illinois had transferred them to the plaintiff in the state of South Dakota. Having been presented and payment refused in Illinois, plaintiff brought suit against the indorser. The defense was that the plaintiff had not presented the drafts within the time prescribed by the law-merchant as in force in Illinois. The statute of South Dakota had enlarged the time fixed by the law-merchant for presenting bills

of exchange, and it was held that the indorser was bound by the law of South Dakota.

Authority for the positions taken in the four cases last above mentioned is found in the language of the court in *Musson v. Lake*, 4 How. (U. S.) 262, 11 L. ed. 967. Here a bill was drawn and indorsed in Mississippi on parties in the state of Louisiana, payable in the latter state. The protest did not set forth that the bill itself had been exhibited to the drawee when payment was demanded, which the defendants claimed was required by the laws of Louisiana. There seems to have been some question under a decision of the supreme court of Louisiana as to whether presentment of the bill itself to the drawee was required, but Mr. Justice McKinley, speaking for the court, said: "There is, however, another question entirely independent of the statute and the decision of the supreme court of Louisiana, which may be decisive of the case before this court; and that question is, whether the contract between the holder and indorser of the bill in controversy is to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and indorsed. The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided in New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the laws of Louisiana. But the drawers and indorsers resided in Mississippi; the bill was drawn and indorsed there; and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawees should pay the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought and is now pending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must, therefore, be governed by the laws of the latter state."

The case of *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518, has often been referred to as opposed to the doctrine announced in the foregoing cases, but the instrument in question in that case was a check, not a bill of exchange, and as it is plain that the drawer of a check contracts to pay at the place where the check is payable, his liability is determined by altogether different rules from the liability of the drawer or indorser of a bill of exchange. In fact, the general principles above given as to the latter were recognized and approved by the court in this case. There is a case, however, where the language used by the court would seem to establish a doctrine opposed to that above announced. But this language is only dictum, and can have but little weight as against the overwhelming number of cases opposed to it. In *Everett v. Vendegas*, 19 N. Y. 436, the indorser of a bill brought action against the drawer and

indorser. The bill had been drawn in New Grenada upon a corporation having its office in New York. The indorsement was not good according to the laws of New Grenada where it had been indorsed, and the question was whether, for the purpose of bringing an action against the drawer and indorser of the bill upon nonacceptance by the drawee in New York, the indorsement was to be tested by the laws of New Grenada or by the laws of New York where it was payable. Judge Denio was of opinion that the indorsement was made for the purpose of enabling the indorsee to present and collect the note in New York, and that in addressing the bill to the drawees in New York the drawer and indorser must be intended to contemplate that whatever was understood in New York to be the payee's order was the thing which he intended by that expression in the bill; and therefore that the validity of the indorsement must be determined by the laws of New York. The decision itself is not in direct conflict with the principle in the above cases, but in the course of the opinion the judge said: "The principal contract, the bill of exchange sued on, though made in New Grenada, was addressed to a corporation legally resident in New York, and was consequently payable there; and, upon general principles, the laws of this state are to be resorted to in ascertaining its nature and interpretation, and the duties and liabilities which it created. This is too well established to require a reference to the books." The learned judge prefaced his remarks, however, by saying that he "had not been able to find any authority for such a case," and his dictum is severely criticised by the court in *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79, where the court, after quoting the remarks of Judge Denio above given, said: "Now, if the learned judge had referred to the books, he would have seen that upon general principles the laws of New York had nothing to do in determining the nature and interpretation, the duties and liabilities, created by the contract of the drawer, who was sued in that case."

In *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137, a bill was drawn in a French West India Island on a mercantile firm in Bordeaux, but indorsed and transferred in New York to a resident of that state. Under the French law it was necessary to present the bill for payment after protest for nonacceptance, and the failure to do this was set up as a defense. It was held that the rights of the holder upon default of the drawees to accept were governed by the law of New York—the indorser being in the position of one drawing a bill in New York on France.

b. **Law Governing the Time, Manner and Sufficiency of Demand and Protest.**—From the above cases, it seems to be established by the decided weight of authority that the necessity of demand and protest must be determined by the law of the place where a foreign bill is drawn or indorsed. We have also seen that the maturity of the bill, which necessarily fixes the date of the demand, is controlled by the law of the place where the bill is payable. It is clear that

any rule which establishes that the sufficiency of the demand is to be determined by a law different from the law of the place which governs its necessity naturally leads to confusion and conflict of opinion. But there are many cases which hold that the time, manner and sufficiency of the demand and protest are governed by the law of the place where the bill is payable. This doctrine is upheld in *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275; *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867, 6 N. E. 885; *Allen v. Harrah*, 30 Iowa, 363; *McClane v. Fitch*, 4 B. Mon. 599; *Piner v. Clary*, 17 B. Mon. (Ky.) 645; *Commercial Bank v. Barksdale*, 36 Mo. 563; *Sylvester v. Cochran*, 138 N. Y. 494, 34 N. E. 273; *Carter v. Union Bank*, 7 Humph. 549, 46 Am. Dec. 89; *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254. In the last-named case a firm in Minnesota drew a bill of exchange on a bank in Christiana, Norway, payable at sight. The payee resided in Norway, and the bill was forwarded to him by his agent in Minnesota, and though he received it in February, he did not present the bill or demand payment thereof till the following April, when it was dishonored, and notice of nonpayment and protest given to the drawers. It appeared that the dishonor of the bill was due to the unnecessary delay in its presentment, though under the law in Norway the payee had one year in which to present it for payment. The drawer was held liable. Said Mr. Justice Field: "In giving a bill upon a person in a foreign country, the drawer is deemed to act with reference to the law of that country, and to accept such conditions as it provides with respect to the presentment of the bill for acceptance and payment. . . . Whatever is required by law to be done at the place upon which the bill is drawn, to constitute a sufficient presentment, either in time or manner, must be done according to that law; and, whatever time is permitted within which the presentment may be made by that law, the holder may take without losing his rights upon the drawer, in case the bill is not paid. So, also, if the bill be dishonored, the protest by the notary must be made according to the laws of the place. It sometimes happens that the several parties to a bill, as drawers or indorsers, reside in different countries, and much embarrassment might arise in such cases if the protest was required to conform to the laws of each of the countries. One protest is sufficient, and that must be in accordance with the law of the place where the bill is payable."

The reasoning of the learned judge in this case is in striking contrast to that of the court in the case of *Amsinck v. Rogers*, 189 N. Y. 252, ante, p. 858, 81 N. E. 1159, 12 L. R. A., N. S., 875, where, regarding the question as to the inconvenience which would arise from the different law and usages of the separate countries, the court thought it was the duty of the holder to forward instructions to the country where the bill was payable as to what was proper protest under the law of the country where the bill was drawn.

The case of *Sylvester v. Cochran*, 138 N. Y. 494, 34 N. E. 273, is of little force in sustaining the doctrine for which it is cited, for it gives as its authority the case of *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518, which involved a check and not a bill of exchange, where, as we have seen, the rule is different.

c. **Law Governing Necessity of Notice of Dishonor.**—Like the necessity of making demand and protest, the necessity for giving notice of dishonor, in order to hold the drawer of a foreign bill, is to be determined by the law of the place where the bill is drawn or indorsed, irrespective of where it is payable: *Belford v. Bangs*, 15 Ill. App. 76; *Bond v. Bragg*, 17 Ill. 69; *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Thorp v. Craig*, 10 Iowa, 461; *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Artisans' Bank v. Park Bank*, 41 Barb. (N. Y.) 599; *Douglass v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874. And all the cases cited above as holding that the necessity of making demand and protest is governed by the law of the place where the bill is drawn or indorsed, by analogy, at least, sustain the same rule as to giving notice of dishonor.

d. **Law Governing Time, Manner, and Sufficiency of Notice of Dishonor.**—Since the maturity of the bill is to be determined by the law of the place where it is payable, and the time of notice cannot, of course, begin to run till the bill has matured—the same complication and conflict of opinion exist in regard to the sufficiency of notice of dishonor as in case of the sufficiency of demand and protest. The cases we have cited above as holding that the sufficiency of the demand and protest is regulated by the law of the place where the bill is payable apply with equal force to notice of dishonor, the leading case being that of *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867, which disapproves of the doctrine laid down in *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137, and holds generally that the condition attaching to a foreign bill of exchange in order to fix liability on the drawer or indorser, must be governed by the law of the place where the bill is payable. In addition to these cases may also be cited that of *Brown v. Jones*, 125 Ind. 375, 21 Am. St. Rep. 227, 25 N. E. 452, where it is held that when a bill of exchange drawn in one state is payable in another, the time within which notice of protest must be mailed to the drawer is governed by the law of the state on which the bill was drawn. This case, however, cites as its authority an old case decided by the supreme court of Indiana, *Shanklin v. Cooper*, 8 Blackf. 41, which was overruled in *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 78.

And the English doctrine seems to favor the rule that the sufficiency of notice of protest and notice must be determined by the law of the place where the bill is payable. This doctrine was broadly announced in *Rothschild v. Currie*, 1 Q. B. 43, and followed in *Hirschfield v. Smith*, L. R. 1 C. P. 340. In the latter case a bill of exchange was drawn in London on a party in Paris, who accepted it,

and afterward the bill was indorsed in blank in London and delivered to another, who also indorsed it in blank and delivered it to the plaintiff. When presented to the acceptor in Paris for payment, it was dishonored and notice of protest transmitted to the French consul, by whom notice in due course according to the French practice was given to defendant. The defendant insisted that, the note having been indorsed by him in London, he was entitled to notice of dishonor according to the laws of England. In holding that the defendant was liable, the court was of opinion that even if the rule in *Rothschild v. Currie*, 1 Q. B. 43, was wrong, that, under the circumstances, the notice of dishonor given according to the law of France should be deemed such reasonable notice as was required by the law of England. Said Earle, C. J.: "The inconvenience would be great if the holder was bound to know the place of each indorsement, and the law of that place relating to notice of dishonor, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas there would be great convenience to the holder if notice, valid according to the law of the place, should be held to be reasonable notice for each of the countries of each of the parties, unless an exceptional case should give occasion for an exception."

THOMPSON v. KNIGHTS OF MACCABEES.

[189 N. Y. 294, 82 N. E. 141.]

SOCIETIES, Liability of, for Personal Injuries During Initiation.—The Supreme Tent of the Knights of the Maccabees is a corporation having jurisdiction over the subordinate lodges or tents, and the members and officers conducting the ceremony of initiating a proposed member may be regarded as the lawfully constituted agents of the Supreme Tent, which may therefore be held answerable for personal injuries inflicted on a proposed member during the ceremony of initiation by an act authorized by the ritual. (pp. 882, 883.)

E. W. Gardner, for the appellant.

George P. Keating, for the respondent.

205 HAIGHT, J. This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff during his initiation into one of the defendant's subordinate tents. The evidence tends to show that in January, 1903, the plaintiff made an application, in writing, to be admitted to a beneficiary membership in Hopewell Tent, No. 305, of the Supreme Tent of the Knights of the Maccabees of the World, and that a benefit certificate issue for five

hundred dollars, ²⁹⁶ payable to his wife. This application was subsequently approved by the medical officers, and plaintiff was elected to membership in Hopewell Tent, and thereupon in February, 1903, he appeared at a meeting of that tent for initiation. At such meeting one McClure, a past commander of the order, at the invitation of the lieutenant-commander, conducted the ceremonies for the initiation of the new members, and during such ceremonies the plaintiff, while standing in line with other applicants for initiation, was suddenly seized from behind by the shoulders, by one Rolland, a member of the order, who had been selected for that purpose, and his body bent backward so that he fell against the man who seized him, producing an injury to the muscles or spinal column of the back, which it is claimed has ever since incapacitated him from manual labor and has caused him much pain and suffering.

While there was some conflict upon the trial with reference to the extent and durability of the plaintiff's injury, the witnesses all substantially agreed with reference to the details of the act complained of. The trial court submitted to the jury the question as to whether the officers and persons conducting the ceremony in question were the agents of the defendant, acting within the scope of their authority to such an extent as to make the defendant liable for the injury produced. This question was raised by the defendant's counsel in his motion for nonsuit and for the direction of a verdict in the defendant's favor, who claimed that the acts complained of were those of the Hopewell Tent, its officers and members, and were not those of the Supreme Tent. This, therefore, becomes the question in the case. If there was evidence given upon the trial sufficient to carry this question to the jury, then the verdict was proper. Otherwise there should have been no recovery.

The Supreme Tent of the Knights of the Maccabees of the World is, as we understand, a Michigan corporation, duly organized under the laws of that state, and has been authorized to transact business in this state as a fraternal beneficiary ²⁹⁷ order, for the relief, by insurance, upon the mutual or assessment plan, of persons or beneficiaries, in the case of disability or death, and its business is transacted upon the lodge plan through subordinate tents or lodges. The plaintiff at the time of his injury was given a copy of the laws of the order, adopted May 11, 1893, but the defendant intro-

duced in evidence a copy of the revised laws of the Supreme Tent, which went into force August 20, 1901. Inasmuch as the plaintiff's injury was received in 1903, we shall consider only the laws of the order then in force. They, in substance, provide that: "The Supreme Tent shall be composed of an unlimited number of great camps and subordinate tents organized as hereinafter provided." "It shall have power to make its own laws, rules and regulations for the government of the association, which shall not conflict with the articles of incorporation or the laws of the land." "It shall possess original and exclusive jurisdiction over all great camps and subordinate tents." "It shall be the supreme tribunal to which all final appeals shall be made on matters arising under these laws." "It shall be the judge of the election and qualifications of its own members, and decide contested elections." "It shall possess the power to regulate and control its benefit funds, fix the monthly rates on members, receive appeals and redress grievances, provide for its own support, and do all other legitimate acts necessary to promote its welfare." "It shall have power, when an appeal is made under the laws of the association from the action or findings of the court of appeals, to decide as to the validity of all death claims or any other claim which a member or the beneficiary of a member may have against it." It, or the board of trustees, when the Supreme Tent is not in session, "may require the surrender by a Great Camp of its charter, supplies, records, property and all its money." Its board of trustees is given the power to pass orders to cover any cases which are not provided for in the laws of the association or by the actions of the Supreme Tent, and to suspend beneficiary members from all the benefits of the association in cases specified. The supreme commander ²⁰⁸ is given the general superintendence of the association, with power to grant dispensations for great camps, and charters to subordinate tents. He may appoint a deputy for each state, and remove from office any tent officer. All the officers provided for by the laws are required to perform such duties as are prescribed by the ritual, and as may be ordered from time to time by the Supreme Tent. The tent commander is required to enforce the laws, rules and usages of the tent and of the association. The lieutenant-commander shall aid the commander and perform such other duties as the rules and ritual may require and the

by-laws of the tent enjoin. The duties of the other tent officers shall be such as are prescribed in the ritual of the association. All rituals shall be procured of the Supreme Tent. When a tent is suspended, all the books, property, etc., must be delivered to the supreme commander of the Supreme Tent. The ritual is a separate book furnished by the Supreme Tent, and among other things prescribes the ceremonies that shall be followed upon the initiation of members. The only part of which is necessary to be considered in this case has reference to the proceedings where the lieutenant-commander approaches the sir knight commander, stating, "You have forgotten the grip," to which the commander replies, "Oh, yes, the grip." He then addresses the candidate for initiation by stating, "You will follow me and note carefully the motion of my fingers." Then the instructions are partly in cipher, which are translated as follows: "The commander should extend his left hand to candidate as if about to shake hands. When the candidate extends his hand to take that of the commander, he should be seized and drawn back quickly by the Master at Arms, or some other member selected for that purpose, who should approach from the rear unobserved by the candidate. As the candidate is thus seized, the lieutenant-commander should say, 'Sir Knight Commander, an imposter!'" It was during the execution of this part of the ceremony prescribed by the ritual that the plaintiff received the injury complained of.

²⁰⁰ The Supreme Tent, as we have seen, is a corporation organized under the laws of another state, doing business in this state. It makes the laws, rules and regulations for the government of all the associations under it. It possesses original and exclusive jurisdiction over all great camps and subordinate tents. It establishes great camps and subordinate tents. These camps and tents are unincorporated associations subject to the control and management of the Supreme Tent, which may, when it sees fit, revoke the charters of the great camps or the subordinate tents, and require the return to it of all the books, records and property they may possess. We thus have a corporation having jurisdiction and control over all subordinate tents, which has enacted by-laws requiring the officers of such tents to carry out the directions of the ritual established and promulgated by it, in which such officers are required to do the very act which produced the injury to the plaintiff. We think that these laws and ritual furnish evi-

dence from which the jury might find that the officers and members conducting the ceremonies in initiating the plaintiff were not only following the directions of the ritual, but that they were also acting as the lawfully constituted agents of the Supreme Tent, within the scope of the authority vested in them, when the injuries complained of were inflicted upon the plaintiff.

The learned appellate division, in granting a new trial, referred to the case of *Jumper v. Sovereign Camp Woodmen of the World*, 127 Fed. 635, 62 C. C. A. 361. We think that case is distinguishable from this case. It did not appear but that the local lodge was an incorporation acting independently of the Sovereign Camp, and it did appear that the act of violence which resulted in the injuries to the complainant was adopted by the lodge itself, and was not authorized by the Sovereign Camp or its practice known to have been indulged in. In the case of *Kaminiski v. Knights of Modern Maccabees*, 146 Mich. 16, 109 N. W. 33, the supreme court of Michigan held that no recovery could be had for injuries of a similar character. In that case the court apparently laid much stress upon the provisions of a ⁸⁰⁰ by-law to the effect that a subordinate tent and its officers should be the agents of its members in all matters, and that the great camp will not in any case be liable for any fault or negligence on the part of a subordinate tent or any of its officers. In this case the provisions are somewhat different. They provide as follows: "A subordinate tent shall be the agent of its members in making applications for membership, in the admission of members, the collection and transmission to the Supreme Tent of all dues and monthly rates, and in the serving of all notices required under these laws to be served on the members of a subordinate tent." "The Supreme Tent shall not be liable for negligence in any of these matters, nor be bound by any irregularity or illegal action on the part of such subordinate tent." It will be observed that the matters for which the subordinate tent becomes the agent of its members are confined: 1. To the making of applications for membership and their admission; 2. To the collection and transmission to the Supreme Tent of all dues and monthly rates; 3. To the serving of all notices required, etc. Nothing in these provisions pertains to the initiation ritual. Then again, referring to the provisions of the next section, we find that the Supreme Tent shall not be liable for negligence in any of

these matters. The matters referred to pertain to the admission of members, the collection and transmission of their monthly rates to the Supreme Tent, and to the serving of notices. The Supreme Tent shall not "be bound by any irregularity or illegal action on the part of any subordinate tent." If any of the provisions referred to have reference to the negligence of the officers of the Supreme Tent in executing the requirements of the ritual, it must be found in the latter provision, "as an illegal action." But this, we think, cannot be the construction intended, for, as we have seen, the ritual expressly authorized the suddenly seizing of the applicant unawares, and the bending of him backward. To hold otherwise would charge the Supreme Tent with requiring its subordinates to do an illegal act, and then with adopting a by-law to the effect that it would not be liable therefor. It ³⁰¹ doubtless did not occur to the officers of the Supreme Tent, in adopting the ritual, that the act authorized by them might in some instances produce harm, or that some of its subordinate officers might execute the command of the ritual with more force than others. But it is apparent that they intended that the applicant should be taken unawares and frightened. He was to be approached from the rear unobserved, and was to be seized and drawn back quickly, with the announcement of the lieutenant-commander, "An imposter." We, therefore, are of the opinion that these provisions ought not to be construed as constituting a contract on the part of the plaintiff to relieve the defendant from liability. But even if they should be so construed, we should still hesitate about adopting the conclusion reached by the Michigan court in the case alluded to; for in *Matter of Brown v. Order of Foresters*, 176 N. Y. 132, 68 N. E. 15, we have held that, "In so far as the defendant attempted by the enactment of by-laws to make the default or misconduct of its own agent and officer the default and misconduct of the members, who had paid their dues and assessments precisely as the regulations required, its action was nugatory." And in the case of *Johnston v. Fargo*, 184 N. Y. 379, 77 N. E. 388, 7 L. R. A., N. S., 537, we have held that a corporation or an association cannot relieve itself from liability for personal injuries by reason of the negligence of its own officers, by requiring its servants to enter into a contract to the effect that it shall not be liable therefor: See, also, *Mitchell v. Leech*, 69 S. C. 413, 104 Am. St. Rep. 811, 48 S. E. 290, 66 L. R. A. 723;

Knights of Pythias v. Withers, 177 U. S. 260, 20 Sup. Ct. Rep. 611, 44 L. ed. 762; Tumber v. Sovereign Camp, 59 Cent. L. J. 48-52.

We are not disposed to criticise the defendant on account of its being a secret society. Its main object is the insurance of its members against disability and death, and as such we recognize the fact that it has accomplished much good. Coupled with the mutual benefit of its members through insurance is the social and fraternal feature, which, through the secret rituals of their lodges, have enabled them to keep their members in touch with each other and interested in the work of the tents. We think, however, that other acts might ³⁰² be prescribed by the ritual, from which the importance of the work of the tent might be impressed upon the mind of the applicant without resorting to violence.

The order appealed from should be reversed and the judgment entered upon the verdict affirmed, with costs in this court and that of the appellate division.

Cullen, C. J., Edward T. Bartlett and Vann, JJ., concur.

Werner and Hiscock, JJ., not voting.

Gray, J., absent.

Ordered accordingly.

The Supreme Lodge of a Mutual Benefit Society authorizing a subordinate lodge as its agent to initiate members into the order, is liable for injuries inflicted upon a candidate for membership by the use of a mechanical goat during such initiation, although the use of such contrivance is not authorized by the supreme lodge: *Mitchell v. Leech*, 69 S. C. 413, 104 Am. St. Rep. 811.

WATERS & CO. v. GERARD.

[189 N. Y. 302, 82 N. E. 143.]

AN INNKEEPER has a Lien on Personal Property in the Possession of a Guest, and held by him under a contract for the conditional sale and purchase thereof, reserving title in the vendor until payment of the purchase price, if the innkeeper, when such property came into his possession, did not know that the guest was not the complete owner thereof. (pp. 888, 889.)

COMMON LAW, Adoption of, in the United States.—The principles and rules of the common law, so far as applicable to our conditions, became and continue in force unless abrogated or modified by express statutory or constitutional enactments. (p. 890.)

COMMON LAW, Construction of Statutes and Constitutions by.—Constitutions and statutes should be construed with reference to the doctrines of the common law, and the constitutional and statutory provisions providing that a person shall not be deprived of life, liberty, or property without due process of law should not be held to have been intended to forbid or affect the right to a lien which had been recognized and sustained by the common law. (pp. 890, 891.)

COMMON LAW, Evidence of.—Where the recognized printed reports of the English courts prior to 1775 show that the common law on any particular subject was by such cases established and determined as therein stated, such reports are the best and highest evidence of such common law. (p. 895.)

AN INNKEEPER has, by the Common Law, a Lien on the Goods of His Guest, although they are the property of a third person. (pp. 895, 899.)

INNKEEPER'S LIEN, When not Extended by Statute.—A statute of New York giving a lien to an innkeeper on the goods of his guest, brought to the inn, whether they belong to him or not, is but a declaration of the common law, and therefore does not extend the innkeeper's lien. (pp. 901, 902.)

INNKEEPERS, Constitutionality of Statute Purporting to Give Lien to.—A statute purporting to give innkeepers a lien on the goods of their guest cannot be held unconstitutional when such statute does not extend beyond the rule established by the common law, nor beyond the requirements of public policy. (p. 902.)

Frederick H. Sanborn, Noel B. Sanborn and George P. Sanborn, for the appellant.

Willard N. Baylis, for the respondent.

305 CHASE, J. In 1898 and 1899 the defendant was the lessee and proprietor of a hotel for public entertainment known as "The Girard," in the city of New York. On August 23, 1898, one Carlisle came casually to said hotel as a guest, and so remained until March 15, 1899, inclusive. During said period she received food and lodging as a guest without any express agreement as to the period of entertainment

or amount to be paid therefor. On March 15, 1899, she owed the defendant for accommodation, board, lodging and extras furnished at her request from day to day between August 23, 1898, and March 15, 1899, inclusive, the sum of one hundred and sixty-one dollars and twenty-four cents, a part of which accrued on March 13 to 15, inclusive, 1899.

On March 15, 1899, she took a lease of certain apartments in said hotel for one year from that day, which apartments she in part furnished, and thereupon occupied the same and continued in the occupation thereof until June 25, 1899, taking her meals from time to time without agreement as to price in the restaurant of the defendant in said hotel. On June 25, 1899, she left said hotel, owing the defendant three hundred and thirty dollars and eighty-five cents, of which amount one hundred and sixty-one dollars and twenty-four cents accrued on and prior to March 15, 1899, as stated, and the balance was due for rent under said lease and for food and incidentals furnished in the defendant's restaurant between March 15 and June 25, 1899. The lease of said apartments contained a proviso that the defendant should have a lien on all of the effects and property brought into said hotel by said Carlisle for any indebtedness accrued or accruing to her.

The plaintiff is a domestic corporation engaged in the manufacture and sale of pianos. On March 13, 1899, the plaintiff delivered to said Carlisle at the defendant's hotel a piano belonging to it under a conditional contract of sale, by the terms of which title thereto remained in the plaintiff until payment in full of the agreed price therefor, and in case of failure by said Carlisle to make any payment on said contract when due, that said contract should at once terminate and the plaintiff become entitled to the immediate possession of the piano. Said Carlisle never paid the full purchase price of ³⁰⁸ said piano, and became in default under said contract on June 13, 1899, and she then notified the plaintiff that she surrendered said instrument and requested the plaintiff to call and remove it. On July 26, 1899, the plaintiff attempted to remove the piano from said hotel, but the defendant refused to permit its removal, claiming a lien thereon as a hotel and boarding-house keeper for the unpaid bills incurred by said Carlisle, and she retains the possession thereof.

On and after July 13, 1899, the plaintiff had the right to the possession of said piano, subject only to any rights that the defendant had by reason of the facts herein stated. The defendant did not know that said Carlisle was not the real owner of said piano or that the plaintiff had or claimed any rights or ownership therein until the demand was made therefor as herein stated. The plaintiff seeks to recover possession of said piano.

The parties agreed upon a statement of facts to be submitted to the court for the determination of their controversy pursuant to section 1279 of the Code of Civil Procedure. The appellate division of the supreme court directed judgment in favor of the defendant, dismissing the plaintiff's complaint, and judgment has been entered thereon, from which judgment the appeal is taken to this court.

In this state prior to 1897 the lien of an innkeeper rested wholly upon the common law. It was first declared by statute in the lien law (Laws 1897, c. 418, sec. 71), although the lien of an innkeeper was recognized in the act for the protection of boarding-house keepers (Laws 1860, c. 446), and the amendment thereto (Laws 1876, c. 319), the act relating to the surreptitious removal of baggage by a guest (Laws 1867, c. 677), the acts relating to the enforcement and foreclosure of an innkeeper's lien (Laws 1869, c. 738; Laws 1879, c. 530), the act extending the lien of an innkeeper (Laws 1894, c. 253), and in the act granting a lien to lodging-house keepers (Laws 1895, c. 884).

Section 71 of the lien law was amended by chapter 380⁸⁰⁷ of the Laws of 1899, and as it read at the time of the submission of the controversy herein it provided as follows: "A keeper of a hotel, inn, boarding-house or lodging-house, except an emigrant lodging-house, has a lien upon, while in possession, and may detain the baggage and other property brought upon their premises by a guest, boarder or lodger, for the proper charges due from him, on account of his accommodation, board and lodging, and such extras as are furnished at his request. If the keeper of such hotel, inn, boarding or lodging-house knew that the property so brought upon his premises was not, when brought, legally in possession of such guest, boarder or lodger, or had notice that such property was not then the property of such guest, boarder or lodger, a lien thereon does not exist."

The provision in the lease by the defendant to Carlisle, by which Carlisle gave to the defendant a lien on all the effects and property brought by her into the hotel for any indebtedness accrued or accruing to the defendant, does not in any way affect the rights of the plaintiff herein, as it was in no way a party to it, and Carlisle could not, by contract with the defendant, transfer to her an interest in the property of a third person.

Upon the facts submitted, the defendant, by the express terms of the statute in effect at the times mentioned, has a lien upon the piano for the entire amount of her claim.

The plaintiff, however, claims that the statute is unconstitutional so far as it gives a lien on property of a person other than the guest. When the piano came into the possession of the defendant through her guest a part of the unpaid account had accrued; a part accrued thereafter while Carlisle remained a transient guest in the defendant's hotel, and the remaining part of the unpaid account accrued while Carlisle was the occupant of the apartments in the defendant's hotel as a guest at an agreed price per year. If the defendant had a lien on the piano for any part of the account claimed by her, she was entitled to retain possession of it, and the plaintiff's demand and claim for the possession of the piano cannot be sustained.

³⁰⁸ It is only necessary to consider whether an innkeeper has a lien on goods rightfully in the possession of a transient guest when such goods are the property of a third person.

Two questions arise for our consideration: 1. Did the common law of England, on and prior to the nineteenth day of April, 1775, give to an innkeeper a lien on goods owned by a third person in the rightful possession of a guest for the value of his guest's entertainment? 2. Apart from the question whether such lien was so given by the common law, is the act, so far as it gives a lien upon goods owned by a third person in the rightful possession of the guest, a violation of our constitution?

Americans claim the common law of England as their natural heritage and shield: Black's Constitutional Law, 9. The universal principle (and the practice has conformed to it) has been that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence

stands upon the original foundation of the common law: 1 Story on the Constitution, sec. 157. The Continental Congress in its declaration of rights asserted that "The respective colonies are entitled to the common law of England."

In the first constitution of this state, adopted in 1777, it is provided as follows: "And this convention doth further, in the name and by the authority of the good people of this state, ordain, determine and declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the nineteenth day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same": Section 35.

Substantially similar provisions were included in the second and third constitutions of this state, and in the constitution of ³⁰⁹ 1894 (article 1, section 16) it is provided as follows: "Such parts of the common law and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five which have not since expired, or been repealed or altered; shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated."

The principles and rules of organized society found in the English common law so far as applicable to our conditions became and continue in force unless abrogated or modified by express constitutional or statutory enactments.

Constitutions and statutes should be construed with reference to the doctrines of the common law: Black's Constitutional Law, 69; 6 Am. & Eng. Ency. of Law, 2d ed., p. 270; 8 Cyc. 377, 383.

In construing the constitutional and statutory provisions which provide that a person shall not be deprived of life, liberty or property without due process of law, it should not be held that there was an intention by convention or legislature to forbid or in any way affect the right to any lien upon property which had been recognized and sustained by the

common law and thus by the law of the land. The writers in encyclopedias and text-books with singular unanimity have asserted that an innkeeper has a lien at common law upon all goods in the rightful possession of his guest for the value of the guest's entertainment. From some of them we quote:

The American and English Encyclopedia of Law (second edition, volume 16, page 548) says: "Corresponding to the extraordinary liabilities which the law imposes on innkeepers is the extraordinary privilege of a lien on the effects of guests for the amount of the reasonable charges for the guest's entertainment. . . . It is essential to the existence of the lien that the goods on which it is claimed should have been brought ^{§10} to the inn by a person coming in the character of a guest, but it is not essential that the guest should in all cases be the owner of the goods."

The Encyclopedia of the Laws of England (volume 6, page 497) says: "He [an innkeeper] is entitled to a general lien upon all goods brought by the guest to the inn for the board and lodging of the guest and his servants and the keep of his horses."

The Cyclopedia of Law and Procedure (volume 22, page 1090) says: "Where a guest brings to an inn goods ostensibly his, the lien of the innkeeper attaches to the goods, although they were in fact the goods of a third person."

In Beale on Innkeepers and Hotels (section 261, page 182) the language just quoted from the Cyclopedia of Law and Procedure is repeated.

In Wait's Law and Practice (fifth edition, volume 1, 655) it is said: "The law gives to any innkeeper a lien whether the goods are the property of the traveler or the property of third parties from whom it has been hired or even fraudulently taken or stolen, if the innkeeper has no notice of the wrong and acts honestly."

In Parsons on Contracts (seventh edition, volume 2, page 156) it is said: "An innkeeper has a lien on the property of the guest (not on his person) for the price of his entertainment even if he be an infant. And he has this lien on goods brought to him by a guest although they belong to another person."

In Overton on the Law of Liens (section 123, page 150) it is said: "If property, goods, horses or the like are brought by a guest to an inn at which he obtains accommodations and leaves the property in custody of the innkeeper, it seems the

lien will attach thereto whether it belong to a guest or to a third person for whom the guest is bailee, or indeed even if it had been stolen by the guest. For the innkeeper is bound to receive and entertain the guest, and when unaccompanied by any suspicions would not be justified in inquiring into the title to the property delivered by the guest to his possession. Possession is *prima facie* evidence of ownership."

³¹¹ In Edwards on the Law of Bailments (third edition, section 474, page 363) it is said: "The relation of innkeeper and guest being established, the lien covers the goods, baggage and property of the guest and all such things as the guest brings with him; it extends to whatever the guest brings and the innkeeper receives; it is not limited to property of the guests or to things of material or intrinsic value. . . . The innkeeper is bound to receive the guest and cannot stop to investigate his title to the property he brings with him, and it may be added he is also liable for the safekeeping of the goods though they may be the property of a third person."

In Jones on Liens (second edition, section 499, page 303, volume 1) it is said: "Thus it has become the settled law with reference to this lien that there is no distinction between the goods of a guest and those of a third person brought by a guest and in good faith received by the innkeeper as the property of the guest. The innkeeper cannot investigate the title of property brought by his guests, and is bound unless there is something to excite suspicion to receive not only his guest, but his horse or other property brought by him as belonging to him, because it is in his possession." And in section 501, page 304, it is said: "It is now settled, however, that the lien is not limited to such things as a guest ordinarily takes with him. An innkeeper who receives a piano in his character as innkeeper, believing it to be the property of his guest, is entitled to a lien upon it for his guest's board and lodging, although in fact the piano is the property of another person who had consigned it to the guest to sell on commission."

In Schouler on Bailments and Carriers (third edition, section 326, page 327), it is said: "The law grants him [the innkeeper] as security for unpaid charges a lien upon all movable property which the guest may have brought with him to the house and placed in the legal custody of the innkeeper as bailee. Even where the thing belonged to a third

person and the guest himself had only a bailee's right therein or was an agent for the owner, the innkeeper's lien will attach, provided only he received the property on the faith of the innkeeping⁸¹² relation. And the innkeeper's knowledge that the guest did not own the goods does not affect the case unless he knew that the possession was wrongful. An innkeeper's rightful lien ought fairly to be coextensive with his liability for all such property of other persons."

In Story on Bailments (ninth edition, section 476, page 446) it is said: "It has been said that the horse of a guest can be detained only for his own meals, and not for the meals and expenses of the guest. The reason is said to be that chattels are in the custody of the law for the debt which arises from the thing itself, and not for any other debt due from the same party, for the law is open to all such debts and doth not admit private persons to make reprisal. This may be correct as to all debts than the debt contracted by the party as a guest, but there seems reason to doubt whether the lien of an innkeeper does not extend to all the goods which a guest has at an inn for all his expenses there. The general rule seems in favor of such a lien whether any expense has been incurred on the particular goods or not. The cases cited to support the opposite doctrine do not seem to justify it."

In Moncrieff on Liability of Innkeepers (pages 55 to 56) it is said: "An innkeeper has a lien for the reckoning of his guest upon all those goods for which he as innkeeper becomes liable. His lien is coextensive with his liability, neither wider nor narrower. This lien will endure even as against a third party being the real owner, provided that the innkeeper when he undertook the custody of the goods did not know that they did not belong to his guest."

In Cowen's Treatise (sixth edition, volume 1, page 359) it is said: "His [an innkeeper's lien] for the keeping of the horse or other property of his guest is valid as against the true owner although the guest did not own it, and even when he stole it, if it was received and kept without knowledge of the facts."

In Wharton's Law of Innkeepers (page 118) it is said: "The innkeeper has, therefore, a lien upon all goods brought by a guest. He is not bound to inquire whether his guest is the owner of goods he brings with him to the inn,

⁸¹³ but only whether he comes as a guest, but he is bound to receive the goods, whatever their nature, provided he has sufficient accommodation, and has, therefore, a lien upon such goods which cannot be defeated even by the true owner."

In a note to Calyes' Case (1 Smith's Leading Cases, tenth edition, page 11) it is said: "By the common law an innkeeper has a lien upon all the goods of the guest brought to the inn for board and lodging furnished by him to the guest at the request of the latter. And this is so although the goods may not be the property of the guest, but belong to some third person, provided the innkeeper is not aware that the goods are not the property of the guest."

The appellant admits that the courts of this state and of England, and the text-book writers, without material exception, hold that an innkeeper has at common law the right to retain all of the goods brought by a guest to his possession as security for the payment of his charges for the accommodation of the guest, and that it is not necessary for the innkeeper to make inquiry as to the ownership of the goods so brought by a guest into his possession; but he asserts that this is the modern rule, and not the rule of the common law of England prior to 1775. He claims that the modern rule was first asserted in England in 1856 (*Snead v. Watkins*, 1 Com. B., N. S., 267), and in this country in 1864 (*Jones v. Morrill*, 42 Barb. 623).

A brief general reference to the common law will aid in considering how we are to determine what a rule of such common law was at a given time. The common law of England is of great antiquity. It consists of rules established by custom. These rules, affected as they were in their inception by the views, habits and necessities of the different peoples which mingled in the early history of the Britons, were principally retained in memory and handed down from person to person and from generation to generation until by custom they became the unwritten law of the realm. Some of these rules are stated in the earliest codes prepared by the Saxon law-givers, and some are stated in subsequent reported ⁸¹⁴ decisions in contested cases. The printed reports of cases decided for many years subsequent to the discontinuance of the Year Books were prepared by unofficial reporters, and consisted of such cases as were selected by them for that purpose and the same case was sometimes reported by more than one person and many of the cases so reported were contra-

dictory and unsatisfactory. It is obvious that where a particular custom was not stated in the report of a decision in a contested case, or where the custom in such case was not stated by the writings of men learned in the law, it rested wholly in memory or a generally recognized tradition. The digests and even the treatises on legal subjects then, as now, followed principally along the lines of the reported decisions, and it is not even in recent years an uncommon thing to discover that a custom or principle of law of common knowledge has never been stated in a reported case. Where recognized printed reports of the English courts prior to 1775 show that the common law on any particular subject was by such case established and determined as therein stated, such reports are the best and highest evidence of such common law. Where the rules of the common law relating to a matter under consideration are not expressly stated in the reported cases of the English courts prior to 1775, the statement of the courts of this country and of England subsequent to that time, especially when they do not purport to modify the common law, are not only entitled to careful consideration, but to great weight in determining the common-law rule prior to 1775. An unreserved statement by a court as to the common-law rule will, in the absence of other authority, be assumed to be based upon custom and the unwritten law long antedating such time.

Our courts have frequently asserted that at common law an innkeeper has a lien upon the goods of his guest although such goods are the property of a third person: *Jones v. Morrill*, 42 Barb. 623; *Betts v. Salisbury*, 12 Alb. L. J. 337; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663; *Ingallsbee v. Wood*, 36 Barb. 452; *Briggs v. Todd*, 28 Misc. Rep. 208; *Wilkins v. Earle*, ³¹⁵ 3 Robt. 368, 44 N. Y. 172, 4 Am. Rep. 655; *Smith v. Keyes*, 2 T. & C. 650; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 205; *Peet v. McGraw*, 25 Wend. 653.

The common-law rule in England and its ancient origin is stated by Lord Escher, master of the rolls, in *Robins v. Grey* [1895], L. R. 2 Q. B. D., 501, as follows: "I have no doubt about this case. I protest against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities and rights of innkeepers with respect to goods brought to inns by guests are founded not upon bailment, or pledge, or contract, but upon the cus-

tom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveler comes to an inn with goods which are his luggage—I do not say his personal luggage, but his luggage—the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveler but not his luggage. If the traveler brought something exceptional which is not luggage—such as a tiger or a package of dynamite—the innkeeper might refuse to take it in; but the custom of the realm is that unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveler and his goods. He has not to inquire whether the goods are the property of the person who brings them or some other person. If he does so inquire, the traveler may refuse to tell him, and may say, ‘What business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in,’ and then the innkeeper is bound by law to take them in, or he may say: ‘They are not my property, but I bring them here as my luggage and I insist upon your taking them in.’ Then the innkeeper’s liability is not that of bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is ³¹⁶ concerned, if they are stolen by burglars, or by servants of the inn, or by another guest, he is liable for not keeping them safely unless they are lost by the fault of the traveler himself. That is a tremendous liability; it is a liability fixed upon the innkeeper by the fact that he has taken the goods in, and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveler. By law that lien can be enforced not only as against the person who has brought the goods to the inn, but against the real and true owner of them. That has been the law for two or three hundred years, but to-day some expressions used by judges, and some questions (immaterial, as it seems to me) which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn, he may refuse to take them in; or if he does take them in, he has no lien upon them. Now, is there any decided case in which it has been held that, although they have been

brought to an inn as the luggage of the traveler and received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveler? There is not one such case to be found in the books. . . . If we were to accede to the argument for the appellants, we should be making a new law, and our decision would produce in very many cases great confusion and hardship. I am of opinion that an innkeeper is bound to take in goods with which a person who comes to the inn is traveling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches, and that the question of whose property they are, or of the innkeeper's knowledge as to whose property they are, is immaterial."

It is assumed by counsel that there were but four cases (and we have found no more) reported from the English courts prior to 1775 involving the right of an innkeeper to retain, until his charges were paid, the property of a third person in the possession of his guest. These cases are *Skipwith v. ——— the Innkeeper*, [1612] 1 Bulst. 170, *Robinson v. ³¹⁷ Walter*, [1617] 3 Bulst. 269, Poph. 127, 1 Rolle, 449, *Stirt v. Drungold*, [1617] 14 Jac. 650, and *York v. Grindstone*, [1703] 1 Salk. 388, 2 Ld. Raym. 866.

Each of the cases so reported is a claim of lien for the keep of a horse which had been brought to the innkeeper by one not the owner thereof. In the first case it does not clearly appear that the person who brought the horse to the inn was personally a guest of the innkeeper. The chief justice being absent, the other members of the court were evenly divided upon the question as to whether the innkeeper could retain the horse until he be paid and satisfied for his meat. The lien was asserted for the reason, and two of the judges held, "That the innkeeper here is not bound to take knowledge of the true owner of this horse thus left to stand in his inn at hay by another."

In the second case the claim of lien is wholly for the keep of the horse against which the lien is claimed. The horse had been left with the innkeeper for half a year, and it was resolved by the court "That the defendant's plea was good, for the innkeeper was compellable to keep the horse, and not bound at his peril to take notice of the owner of the horse. And by the custom of Lond. if a horse be brought to a common inn where he hath (as it is commonly said) eaten out his head, it is lawful for the innkeeper to sell him,

and there is a difference where the law compels a man to do a thing and where not."

In one of the reports it appears that one of the judges, in addition to holding that the innkeeper was entitled to a lien because he was compelled to receive the horse, also said that "The owner would have had to find meat for his horse, and for that reason it is right he should satisfy it now to the innkeeper, for he will not be to a greater charge than he must have been if he himself had fed him."

In the third case a horse, saddle, bridle and saddle-cloth were brought to the inn. The innkeeper claimed a lien on the horse for its keep, which claim was sustained; the report ³¹⁸ further says: "But some question was made whether he might retain the saddle, bridle and cloth as well as the horse."

And in the fourth case the lien was sustained upon the ground that the innkeeper was bound to receive and entertain guests and, therefore, might detain the goods of guests till payment.

The question as to an innkeeper's general lien upon all the goods and property in the possession of his guest was not litigated and is not determined in either of said four cases. The decision in each of said cases is principally important at this time because of the reasons given for sustaining the lien. We have seen that while in each of the four cases the lien could have been sustained as a special and particular lien, it was also and principally sustained because of the fact that an innkeeper is compelled to receive a guest and his goods, and is not required to make inquiry as to the true owner of the goods so in the possession of his guest, and that because he is so bound to receive the guest and his goods he is allowed a lien for his reasonable charges in connection therewith. In the early decisions there is some confusion as to whether an innkeeper had a general lien for his charges on the goods brought by a guest to the inn, or whether the lien was solely upon the particular property benefited or preserved. The special or particular lien as distinguished from a general lien is based upon the benefit derived by the owner of the particular property in having it improved or preserved as in the case of a disabled or derelict ship at sea, in which case salvage is allowed. Where the lien is based upon the fact that the person or property has been benefited or preserved by the innkeeper in furnishing accommodation and food therefor, the ownership of the property is immaterial. The lien extends

only to the property benefited or preserved, even if it is brought to the inn by the owner. Little, if any, claim on which to base a particular lien could be made against inanimate objects. Such a lien would not answer the demands of public policy in the case of an innkeeper and his guest. The liability of an innkeeper at common law as a bailee is not questioned. ³¹⁰ Public policy required that an innkeeper should receive as guests all travelers applying to him for accommodation, together with the luggage and property in their possession. The innkeeper became responsible for the personal safety of the guest and an insurer of the luggage and personal property in his possession against all loss and damage not occasioned by the act of God, the public enemy or the negligence of the guest himself. From a time prior to 1775 the general lien of an innkeeper upon the goods owned by the guest has been conceded, and it is not now disputed by the appellant. The reason for the general lien is as applicable against the property of third persons in the possession of the guest as against the property of the guest himself. Because the innkeeper was compelled to receive the traveler and accept the extraordinary liability which extends not only to the luggage and personal property owned by the traveler but to the luggage and personal property in his possession although owned by another, it was necessary to give to the innkeeper a compensatory lien for his charges to make the maintenance of inns desirable. The extraordinary liability and the lien are concurrent, and go hand in hand, and together make up the rule founded on public policy.

The four old cases especially called to our attention recognize the reason for the rule, and to that extent justify the claim that such lien was given even against the property of third persons prior to 1775. In no one of the cases reported since 1775 either in this state or in England where an alleged lien by an innkeeper against the goods of a third person has been sustained has it been suggested that the court was thereby extending the common-law rule as it existed in England prior to 1775. In each case the lien is sustained upon the common law as it existed at the time the decision was made, which rule could not then have existed except by reason of a custom which had continued for such a period of time that the memory of man runneth not to the contrary. The statutory rule adopted by this state in 1879 does not, in our judgment, extend the rule, so far as it relates to the property

³²⁰ of a third person in the lawful possession of a guest, beyond the rule of the common law as it existed prior to 1775.

The reason for the rigorous rule of the common law is well stated in *Crapo v. Rockwell*, 48 Misc. Rep. 1. Although the conditions which existed when the rule was established at common law have materially changed, the same considerations of public policy justify the maintenance of the rule at the present time. So our courts have held from time to time. Thus in *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 205, referring to the responsibility of an innkeeper for the safekeeping of property committed to his custody by a guest, this court say: "This custom, like that in the kindred case of the common carrier, had its origin in considerations of public policy. . . . The safeguards of which the law gave assurance to the wayfarer were akin to those which invested each English home with the legal security of a castle. . . . The considerations of public policy in which the rule had its origin forbid any relaxation of its vigor. . . . The growth of commerce and increased facilities of communication have so multiplied the class for whose security it was designed that its abrogation would be the removal of a safeguard against fraud in which almost every citizen has an immediate interest. . . . The traveler is entitled to claim entire safety for his goods as against the landlord who fixes his own measure of compensation and holds the property in pledge for the payment of his charges against the owner. . . . The rule is a salutary one, and should be steadily and firmly upheld, subject to the statutory regulations for the protection of hotel proprietors from fraud and negligence on the part of their guests": See *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 658.

In *Briggs v. Todd*, 28 Misc. Rep. 210, it is said: "In the mammoth hotel of to-day with its numberless rooms, its army of servants, its incessant stream of arriving and departing transients, the property of the guest is at the mercy of many people. His own room is necessarily accessible to a number of the employés of the hotel, where fraud or neglect may subject ³²¹ him to loss. He cannot prevent the injury and after he has suffered it he is powerless to detect or prove guilt. The stranger disappears, and the servants protest ignorance and innocence. . . . Considerations of public policy which, in the interest of commercial prosperity and social welfare, require that intercourse in and between cities and towns be full,

free and secure—preserve and reaffirm the wisdom of the ancient rule.”

In *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 56 Am. St. Rep. 616, 45 N. E. 369, 34 L. R. A. 682, this court sustained a recovery against the steamboat company for loss by a passenger of his personal effects, applying the rule of the common law as to liability between the plaintiff and the defendant in that case, and said: “No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations.”

The right which an innkeeper has to require payment in advance for the accommodation of a guest in view of the uncertain length of time that the guest may stay at the inn and the uncertainty in regard to what may be required by the guest in the way of accommodation from day to day is insufficient as a practical means of protection to the innkeeper. Unless the innkeeper's lien extends to all the luggage and goods which the guest brings to the inn, and for which the innkeeper becomes responsible as an insurer, an opportunity is afforded by which great fraud might be perpetrated upon the innkeeper through a relative or other person claiming the ownership of the luggage and goods in the possession of the guest. So long as public policy requires that an innkeeper be held to the extraordinary and severe responsibility prescribed by the common law, the same considerations of public policy require that the rule of the common law be retained in its entirety, and that the innkeeper have a lien upon the luggage and goods in the possession of the guest for payment of his reasonable charges. All property is held subject to such general regulations as are necessary to the common good and the public welfare.

³²² The courts have sustained a statute authorizing the seizure and sale of any goods or chattels in the possession of a tax debtor: *Hersee v. Porter*, 100 N. Y. 403, 3 N. E. 338. In that case this court said: “For the purpose of collecting the tax the actual ownership in contemplation of the statute follows the actual possession.”

Distress for rent, abolished by statute (Laws 1846, c. 374), was permitted even against the property of a stranger found on the demised premises.

The owner of real property who owns it or permits it to be occupied by a tenant for the sale of intoxicating liquors may,

be subjected by statute to a personal liability to one injured in person or property by or in consequence of the intoxication of any person who obtained the liquor producing the intoxication (even lawfully) in whole or in part on such real property: *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

A law subjecting the logs of one owner in a log boom to a lien for fees due a surveyor-general for surveying and scaling all the logs in the boom, including those of other owners, is valid: *Lindsay & Phelps Co. v. Mullen*, 176 U. S. 126, 44 L. ed. 400.

This court is now concerned in the provisions of the act in question except as herein stated. We have seen that the act does not extend the rule beyond that established at common law or beyond the requirements of public policy, and the statute in so far as we have stated is, therefore, constitutional.

The judgment of the appellate division should be sustained.

Cullen, C. J., Gray, O'Brien, Vann, Werner and Willard Bartlett, JJ., concur.

Judgment affirmed.

Innkeepers' Liens are discussed in the note to *Wertheimer-Swarts Co. v. Hotel etc. Co.*, 107 Am. St. Rep. 868.

STRONGE v. KNIGHTS OF PYTHIAS.

[189 N. Y. 346, 82 N. E. 433.]

EVIDENCE Admissible for One Purpose Only is not to be Considered for Another.—Evidence which is purely hearsay and incompetent as to one issue, but admissible as to another, is not to be considered as bearing on the former. (p. 906.)

INSURANCE in Beneficial Associations, Rights of Beneficiary, When Protected by Contract from Impairment by the Person Whose Life is Insured.—If a man makes an agreement with his sister in law that if she and her husband will give up their home in one city and remove to another, and will at the latter place take care of such man while he chooses to remain with them, he will make her the beneficiary in a certificate of insurance in a beneficial association to be issued upon his life, and the certificate is thereupon accordingly obtained and the contract performed upon her part, he has not the right to subsequently cancel the designation and substitute another person as beneficiary. (p. 906.)

BENEFICIAL ASSOCIATION, Estoppel Against, to Contest the Right of a Person to be Made a Beneficiary.—If the certificate issued by a beneficial association insuring the life of a member makes his sister in law the beneficiary, disclosing her relation to him, the association, after receiving payment of the accruing dues, is estopped upon his death to defend against her on the ground that she was not a proper person to be designated as beneficiary. (p. 908.)

S. Livingston Samuels, for the appellant.

James C. de La Mare, for the respondent.

³⁴⁸ **HISCOCK, J.** While the courts below have taken a different view, we regard the controlling question in this case the one whether a member of a mutual benefit association may so procure a beneficiary to be designated and a certificate to be issued to him for a valuable consideration that the member will by such latter circumstance be prevented from exercising the privilege ordinarily possessed in such an association of changing his beneficiary as often as desired.

Our view is that he will be prevented from changing and canceling the designation of the beneficiary who has been made such for a valuable consideration.

The facts which present and lead to the consideration of this question are as follows:

One Irvine was a member of the Endowment Rank, Knights of Pythias. He was living in New York and was seriously sick. He made an agreement with his sister in law, the appellant, which is evidenced by the testimony of herself and her husband and by some other testimony, that if she and her husband would give up their home in New York and take a cottage in New Jersey and take him along, and if the appellant would nurse and take care of him while he chose to remain with them, he would make her the beneficiary in his certificate in the association in question. This arrangement was carried out, and while Irvine desired to, he lived with his sister in law and was nursed and cared for by her. A few days after the agreement was made the certificate in suit was ³⁴⁹ taken out, naming appellant as beneficiary, and was delivered to her and ever since has remained in her possession.

Subsequently Irvine went to Texas and thereafter attempted to cancel the designation of appellant as beneficiary and to substitute another person. The by-laws of the association provided that a change of beneficiary might be made at any time and as often as desired, the consent of existing beneficiaries not being required; also, in substance, that the appli-

cation for change should be made to and passed upon by the "board of control," and "in case a member desiring to change his beneficiary should (shall) be unable to surrender the original certificate then in force by reason of any act or refusal of the beneficiary named therein or fraud or other cause, the board of control might (may) issue a new certificate on proof of the facts by affidavit of the member and the execution by him of such instruments of release or indemnity as should (shall) be deemed necessary." The certificate issued to appellant provided "that the beneficiary herein designated shall acquire no interest whatever in the certificate nor in the indemnity fund until the benefit shall have lawfully accrued by reason of the death of said member, and no subsequent change in the beneficiary shall have been made." When Irvine attempted to cancel the designation of appellant and designate a new beneficiary, the latter refused to give up the certificate which had been delivered to her, and, therefore, the former was unable to comply with the regulations of the association by delivering the old certificate in connection with his application for a new one. He, however, submitted such letters and affidavits that in accordance with the by-laws he would naturally be entitled to a new certificate upon giving indemnity, and he was informed that if he would forward a bond in an amount specified his application for a new certificate would doubtless be passed upon favorably. He died, however, before complying with this requirement.

It has been claimed, and thus far held in effect, that Irvine had a perfect right to designate a new beneficiary; that he did all that was in his power to accomplish such new designation, ³⁵⁰ and that he was prevented from complying with the requirement for a surrender of the old certificate by the wrongful refusal of the appellant to deliver the same up, and that within the principles of *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554, 66 N. E. 670, 61 L. R. A. 791, such wrongful act of appellant should not be allowed to prevent the new designation, but that the same should be regarded as having been made.

It is urged in behalf of the appellant in this connection that this case differs from the *Lahey* case, in that Irvine had the right which the member there did not have of securing a new designation in spite of the fact that he did not produce the old certificate by giving a bond of indemnity, and that, therefore, his application should not have the benefit of the

principles which were applied in that case. It is also said that the person whom Irvine desired to designate in the place of appellant did not occupy such relationship to him as would permit her designation. Because of the view which we take upon the other question already mentioned we shall assume without now deciding that Irvine desired to designate a proper person, and what he did and attempted to do in the way of making such designation would have brought him within the principles of the Lahey case if appellant's conduct in refusing to give up her certificate was without justification and wrongful. Of course, if it was not without justification and wrongful, then the fundamental fact is lacking which served as the basis for the Lahey decision, and so we come directly to the consideration of her conduct.

As we judge of the proceedings upon the trial there was no dispute either in testimony or argument that the contract claimed in behalf of appellant with Irvine was made. The case was apparently tried by the counsel for the respondent, as it has thus far been decided, upon the theory that such contract was immaterial. There was no cross-examination either of the appellant or of her husband upon this point. As already stated, their evidence was corroborated by other testimony and circumstances. It is true that respondent put in evidence without objection some letters by Irvine to the ³⁵¹ association which denied appellant's present claim that she acquired the certificate for value. These documents, however, were competent evidence under the other defenses urged by respondent, and they were received after the statement by its counsel that "We have no evidence to contradict it"—that is, the claim of a designation for value. The latter evidence, therefore, which was purely hearsay and incompetent upon this point, is not to be regarded as offered for the purpose of contradicting appellant's testimony: *Dayton v. Parke*, 142 N. Y. 391, 396, 397, 37 N. E. 642; *Lehman v. Frank*, 19 App. Div. 442, 444, 46 N. Y. Supp. 761.

In fact, we do not understand it to be claimed upon this appeal that there was any issue of fact, and we think we are fully justified in regarding it as established as a matter of law that the contract claimed by appellant was made: *Hull v. Littauer*, 162 N. Y. 569, 572, 57 N. E. 102; *Second Nat. Bank of Morgantown v. Weston*, 172 N. Y. 250, 258, 64 N. E. 949.

Thus assuming that a contract was made by a member for a valuable consideration to take out a certificate for the benefit of appellant, it seems to us very clear after the certificate has been taken out and the consideration fully furnished by the beneficiary, the member will not be allowed to destroy the rights of his creditor by a new certificate naming a new beneficiary. We do not regard the by-laws and provisions of the certificate or the authorities called to our attention providing for and upholding the right of a member to change the designation of his beneficiary as often as desired without the consent of the latter as at all applicable to such a case as this. They relate to a case where voluntarily and gratuitously designation has been made of a beneficiary who, in the language of the certificate, has acquired "no interest whatever in the certificate nor in the indemnity fund." But can there be any doubt that a member of one of these associations might say to a person that if the latter would loan him a thousand dollars he, the member, would take out a certificate designating the creditor as beneficiary as security for such loan, such designation not to be canceled or changed ³⁵² without the consent of the creditor, and that this contract and agreement would estop and prevent the member from changing the designation, whatever might be the ordinary privileges and regulations as between him and the association when no rights of a third party had intervened? While the agreement detailed by appellant is not in terms as complete as the one assumed, we think it is just as effective, because what the parties have omitted specifically to say as between themselves the law says for them. Irvine agreed that he would procure the certificate to be issued designating appellant as beneficiary if she and her husband would establish a new home, take him with them and care for and nurse him in his sickness. The appellant performed her part of the contract and Irvine performed his so far as procuring the certificate to be issued was concerned, and the law now prohibits him from destroying the rights which appellant has acquired in the certificate for a valuable consideration.

Independent, however, of any original reasoning which may be indulged in upon this proposition, the decisions already made seem clearly to establish the rights of appellant as claimed by her.

In *Conselyea v. Supreme Council Am. L. of H.*, 3 App. Div. 464, 38 N. Y. Supp. 248, affirmed, without opinion, 157 N. Y.

719, 53 N. E. 1124, it appeared that the certificate had been issued to the husband for the benefit of his wife, the plaintiff, as part of a separation agreement, the husband agreeing not to change the beneficiary named in the certificate, and the wife agreeing to maintain the insurance, which she subsequently did. In violation of his agreement the husband endeavored to withdraw from the council and surrender his benefit certificate. It was held that this attempt was in violation of the laws of the council, but it was also held that the certificate had passed into the possession of the plaintiff under circumstances which vested the title thereto in her for value, and that her rights in and to the certificate having been secured for value, she could not be deprived of them in the absence of any law of the order which, regardless ³⁵³ of her equities and legal rights, would destroy the validity of the certificate.

In *Webster v. Welch*, 57 App. Div. 558, 68 N. Y. Supp. 55, a mutual benefit insurance company had issued a certificate upon the life of the deceased in favor of one of his daughters, naming her as the sole beneficiary, under an agreement that she should care for her father during life, which agreement was carried out. Subsequently the deceased procured the issue of new certificates, which changed the designation of the beneficiary. It was held that the daughter acquired a vested interest in the certificate, and that she could not be deprived of that interest by subsequent changes procured by the member in derogation of her rights.

In *Smith v. National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616, it was held that the provision of the statute (Laws 1883, c. 175) providing for the incorporation of co-operative life insurance societies, which declares that membership in such a society gives the member the right to make a change in his payee or beneficiary without the consent of such payee or beneficiary, applies simply when the original designation is in the nature of an inchoate or unexecuted gift, and does not prevent a contract between the member and the payee by which a vested right passes to the latter, and in such case, without his consent, the payee may not be changed. In that case the member made an agreement with his creditor to the effect that he would secure his debt by an insurance on his life and then became a benefit member of a corporation organized under the act above mentioned, and by the certificate issued to him the society agreed to pay the sum insured

to the creditor, and it was held that the latter stood as an assignee of the policy, and that the transfer was not revocable.

The case of *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554, 66 N. E. 670, 61 L. R. A. 791, especially relied upon by the respondent in this case as affirming the right of a member in a mutual benefit association to procure a new certificate and designate a new beneficiary after a former certificate has been issued and a former beneficiary has been designated, expressly recognizes the principle determined by the foregoing ³⁵⁴ cases, and that a beneficiary may be so designated for a valuable consideration that his rights may not be subsequently cut off by a new designation. Judge Martin writing for the court says: "She [the respondent who was claiming a designation under much the same circumstances as apply to appellant], however, contends that the right to change the beneficiary in a certificate, like every other valuable right, may be sold or transferred, and when transferred for a valuable consideration the insured loses the right to transfer it to others. (Citing cases already cited.) In those cases it was held that the statute which gave to a member the right to make a change in the beneficiary without the consent of the latter applies only when the original designation is in the nature of an inchoate or unexecuted gift, and does not prevent a contract between the member and his beneficiary by which a vested right passes to the latter, and in such case, without his consent, the beneficiary may not be changed. The cases cited are clearly distinguishable from the case at bar, in that in the former the beneficiary became such for a valuable consideration and the association issued a certificate to such beneficiary, while in this case, although the court has found that the mother paid a valuable consideration for a transfer of the certificate or a portion of its benefits, still no certificate was ever issued to her, nor was the certificate which was issued and made payable to the plaintiff ever canceled, so that she ceased to be a beneficiary under it."

We do not regard as well made the contention of respondent that appellant, as a sister in law of Irvine's, was not a proper person to be designated as beneficiary. The certificate upon its face disclosed her relationship, and the association having issued it to her and received payment of dues thereunder, is now in no position to assert any such defense as is suggested.

Thus we conclude that not only was the refusal of appellant to surrender the old certificate not wrongful, so as to excuse the nonperformance by Irvine of certain acts otherwise essential to the issue of a new certificate, but Irvine was ³⁵⁵ not entitled to have a new certificate issued as against appellant even if he had complied with respondent's regulations.

The judgment of the appellate division should be reversed and a new trial granted, with costs in both courts to abide event.

Cullen, C. J., O'Brien, Edward T. Bartlett, Haight, Werner and Chase, JJ., concur.

Judgment reversed, etc.

A Member of a Beneficial Association ordinarily has the right to change his beneficiary at will, provided that in so doing he complies with the rules of the association. Nevertheless many authorities seem to take a contrary view, and hold that the beneficiary has a vested interest even before the death of the insured: See *Knights of Maccabees v. Sackett*, 34 Mont. 357, 115 Am. St. Rep. 532; *Perry v. Tweedy*, 128 Ga. 402, 119 Am. St. Rep. 393, and cases cited in the cross-reference note thereon. But if it is conceded that the insured has a right to change his beneficiaries at pleasure still he may contract this right away: *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639; *Grimley v. Harrold*, 125 Cal. 24, 73 Am. St. Rep. 19.

MATTER OF METZ v. MADDOX.

[189 N. Y. 460, 82 N. E. 507.]

CONSTITUTIONALITY OF STATUTE Requiring the Recanvassing of Votes.—A statute authorizing a proceeding to recanvass the votes cast at a prior election for the office of mayor of a city or a judicial hearing and determination of the title of the respective candidates at that election contravenes the section of the state constitution declaring that all laws creating, regulating or affecting boards or officers charged with the duty of receiving, recording or counting votes at elections shall secure an equal representation of the two political parties, or of that section providing that trial by jury in all cases in which it has heretofore been used shall remain inviolate forever. (pp. 913, 914.)

CONSTITUTIONAL LAW—Invalid Provision of Statute, When may not be Disregarded and the Remainder Enforced.—Where a statute in effect authorizing a judicial proceeding to determine the title to office of candidates at a preceding election for mayor purports to deprive the parties in interest of the right to a trial by

jury, the courts will not disregard this provision as unconstitutional and declare the remainder of the statute valid. (p. 918.)

CONSTITUTIONAL LAW—Power to Create a Tribunal and Authorize the Recounting of Votes.—Where the results of an election have been canvassed and determined under the provisions of law then existing, and a certificate of election given conferring a prima facie title to the office, possession of which has been held thereunder, the legislature has no power to create a new tribunal to authorize it to recanvass the election and award the possession of the office to another claimant should he be found entitled thereto. (p. 919.)

Francis K. Pendleton, corporation counsel, William B. Growel, and Francis Martin, for Herman A. Metz.

Eugene Lamb Richards, Jr., for George B. McClellan.

Clarence J. Shearn, for the respondents.

402 CULLEN, C. J. At the general election held in November, 1905, the office of mayor of the city of New York was to be filled. The two leading candidates for that office were George B. McClellan, and William R. Hearst. After the canvass of the votes a certificate of election was duly issued by the board of elections of the city of New York to George B. McClellan, and on the 1st of January following he entered into possession of the office under said certificate and has held it ever since. The contest for the office was comparatively close, there having been nearly six hundred thousand votes cast, and the majority returned for McClellan being about three thousand four hundred. Question was raised as to the fairness of the election and the accuracy of the result certified. In 1906 an application was made by Mr. Hearst to the then attorney general for the commencement of an action in the nature of quo warranto to test ⁴⁶³ the title of McClellan to his office. This application was denied. In 1907, a new attorney general having been elected, the application was renewed and a suit brought against McClellan, which is now pending. On the eighteenth day of June, 1907, there was enacted by the legislature and approved by the governor a statute (Laws 1907, c. 538), the validity of which is the subject of this controversy. It is entitled "An act to provide for a judicial recount and recanvass of the votes cast for the office of mayor at the election of the seventh of November, nineteen hundred and five, in all cities of the first class in which the ballots have been preserved," and it will be given in detail hereafter. It is sufficient at this point to say that the act provided for a recanvass of the votes on the

petition of any candidate for said office. In June Mr. Hearst presented his petition to a special term of the supreme court in the second judicial department for a recanvass of the votes under the terms of the statute, and a few days thereafter a similar petition to the supreme court in the first judicial department. The justices to whom such applications were made proceeded to conduct a recanvass of the votes, whereupon the present appellants, the comptroller and other officers of the city of New York, and McClellan individually applied to the appellate divisions of the two departments for writs of prohibition restraining the special term of the supreme court from proceeding on said petition on the ground that the statute was unconstitutional and void. On the return of the alternative writs the controversy was submitted to the courts. The appellate division of the second department first reached a decision and upheld the validity of the statute by a divided court. The learned justices of the appellate division of the first department were unanimously of opinion that the statute was unconstitutional, but deemed it proper to follow the decision of the second department, earlier made, without regard to their own judgment. Orders were entered in each department denying the writ. From these orders appeals have been taken to this court. No objection is made before us as to the procedure ⁴⁶⁴ adopted by the appellants, and the sole question before us to be determined is whether said statute of 1907 is in contravention of the provisions of the constitution.

The statute reads as follows: "Section 1. Upon the petition, within twenty days after the passage of this act, of any candidate for the office of mayor voted for at the election of the seventh of November, nineteen hundred and five, in any city of the first class in which the ballots have been preserved and upon such notice as the court shall prescribe, the supreme court, in any judicial district, within which any of the election districts affected are situated, must proceed to a summary canvass of the vote in any election district specified in the petition. The court shall, in such a proceeding, make an order, a copy of which shall be served upon each candidate voted for at such election, that all the requisite ballots shall be produced in the county courthouse and canvassed in the presence of all candidates affected, or the counsel of such candidates as shall have appeared in the proceeding, and of an attorney who shall be appointed by the court and

designated in the order as commissioner. The commissioner shall canvass the ballots one by one, permitting the counsel for the candidates affected to examine them. If counsel differ from the commissioner as to the counting of any ballot, it shall be at once placed on one side as a disputed ballot. At the conclusion of the canvass of the vote in each election district, the commissioner shall prepare a written statement of the count upon the undisputed ballots, and that statement, together with all the disputed ballots, shall be submitted to the court. The court shall thereupon proceed to canvass the disputed ballots and shall rule upon each ballot in turn. If exception is taken to any ruling, the court must indorse its ruling and the exception upon the back of the ballot in ink. At the conclusion of the canvass the court shall make, in triplicate, a final order for each election district specified in the petition, which shall contain a complete return of the vote under review. One of these orders shall be filed in each office when the returns of the election officers ⁴⁶⁵ have been filed, which returns it shall in all respects supersede. A summary appeal may be taken to the appellate division from any such final order within ten days after it is made. Upon such an appeal, beside the order of the court below, only the ballots as to which exception was taken in the court below shall be produced, and the appellate division shall proceed to canvass them in a summary way. The appellate division shall make, in triplicate, a final order for each election district which shall contain a complete return of the vote then under review. One of these orders shall be filed in each office where the returns of the election officers have been filed, which returns and the order of the court below it shall in all respects supersede. No appeal shall be taken from any such order of the appellate division.

“Sec. 2. Within ten days after filing the order or orders containing a return of the vote under review, or, if an appeal therefrom has been taken, then, within ten days after filing the final order or orders of the appellate division, the board or officer authorized to issue certificates of election must prepare from said orders and from the returns not then superseded a tabulated statement showing the total number of votes cast for each candidate for the office of mayor at the election aforesaid, which tabulated statement, certified by the board or officer aforesaid, shall be filed in the office of the said board or officer. Thereupon and within three days the

said board or officer shall issue and deliver a certificate of his election to the candidate shown to have received the greatest number of votes for the office of mayor, which certificate shall, in all respects, if it shall change the previously declared result of the election, supersede the certificate theretofore issued by the said board or officer. Upon receipt of such new certificate, the candidate certified therein to have been elected shall forthwith take office, be invested with the powers and perform the duties appertaining to such office. Any justice of the supreme court may make such summary order or entertain such proceedings as may be necessary to carry said recount into effect and secure to the candidate ⁴⁶⁶ shown by said recount to have been elected, full possession of the office of mayor and the exclusive right to exercise the functions of said office.

“Sec. 3. Nothing in this act contained shall impair or affect any right under the constitution or laws of this state to question, by proceedings in the courts, the right or title of the candidate who shall, as a result of said recount, be declared elected; but there shall be no judicial review of any ballots which shall have been canvassed in the proceedings herein authorized.”

The remainder of the statute provides for the validity of the acts of the incumbent of the office until the issue of the new certificate, if that changes the result, and for defraying the expenses and costs of the proceeding, provisions that are not material to our discussion of the case.

The constitutionality of the statute before us has been attacked on many grounds. Some of the objections presented to it are frivolous and need no consideration. There are some others which raise questions fairly debatable and might be difficult to answer. All of these, however, we do not intend to review, as we think the statute so clearly contravenes the constitution in one of two respects as to render it unquestionably invalid. The proceeding authorized by the statute either is, as its title indicates, a recanvass of the votes cast for the office of mayor, or is a judicial hearing and determination of the title of the respective candidates at that election to the office of mayor. Elaborate discussion is to be found in the briefs of the opposing counsel and in the opinions of the learned judges of the courts below as to which of these two is the real character of the proceeding. Neither at this

point nor, indeed, at all, is it necessary to definitely determine which is the true character of the proceeding. If it is a recanvass, it contravenes section 6, article 2 of the constitution, which provides: "All laws creating, regulating or affecting boards of officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall ⁴⁰⁷ secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes." If, on the other hand, it is a judicial determination of the title to office it contravenes section 2, article 1 of the constitution, which provides: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." That the courts by whom the recanvass is to be made are not bi-partisan bodies is apparent, and that the statute provides for no determination by a jury of the disputed issues of fact is equally clear. Here we may well rest, and it is necessary to consider only the arguments adduced to withdraw the statute from both these constitutional limitations.

It is urged by counsel for the respondent that there has prevailed in this state for some years a certain measure of review exercised by the courts over the action of canvassers and that the validity of the election law authorizing such review has never been challenged. The statement is entirely correct. Nor do we think that the validity of the legislation can be successfully challenged. But the recanvass authorized by this statute is of a far different character. Under the general election law ballots not marked in accordance with the statutory provisions are void and the canvassers do not count them. Ballots protested by either party as marked for identification are counted. The void ballots and the protested ballots are not returned to the box, but inclosed in envelopes and deposited in the clerk's office. Either party may appeal to the courts to review the action of the canvassers in holding any ballot void or to have any of the protested ballots thrown out as marked for identification. This review presents for determination only questions of law arising on the face of the ballots. Boards of canvassers have never been wholly exempt from judicial control. There has been no time in the history of the state when mandamus would not lie to compel a board of canvassers to do its duty, but at no time have the

courts had power to compel the board ⁴⁶⁸ of canvassers to certify the result of their canvass by specifying any particular number of votes as cast for one party or the other. In other words, the actual count and determination of the result of the count of the ballots has always been the exclusive province of the board of canvassers, subject to review in but one proceeding known to the law, quo warranto. Of course, the officers making a false count could be punished for their crime. Their false determination was no protection to them. Now, it was the count, in which at all times there has been the greatest danger of fraud, that the constitution intended to safeguard, and the people by the constitution determined that the best way to safeguard the count was to require it to be made by a bi-partisan board. The most cursory examination of the present statute will show how widely the scheme provided by it differs from any review or control the courts have ever exercised over a board of canvassers. By this statute an absolutely new canvass is to be made, proceeding from the very initial step, that of counting the votes in the boxes. The title of the statute well describes the proceeding as a "recount and recanvass." The effect of the proceeding is or may be to give a certificate of election to another person than him whom the original canvass showed to be elected. The legislature can no more authorize a recount and recanvass by other than a bi-partisan board, the result to act as a substitute for that of the original canvass, than it can authorize a count and canvass to be made in the first instance by other than a bi-partisan board. Of course, this statement is made on the assumption that the title of the statute accurately characterizes the proceeding therein described, and that it does not provide for a judicial determination of the title to the office, in which latter aspect we will now proceed to consider the validity of the act.

There are serious difficulties in treating the proceeding as one to determine the title to office. What does the statute direct the court to do after the receipt of the petition? There is no provision for any answer to the petition, nor if its allegations be denied for any hearing on the issues raised by such ⁴⁶⁹ denial. There is no provision for the examination of witnesses as to the identity of the ballots and their preservation, nor on any other question of fact that might arise. Still, it is possible that the proceeding being before a court, we should construe the statute as implying that questions of fact arising in the proceeding should be disposed of in the ordinary man-

ner prevailing in judicial trials, and it is very probable that we should consider it our duty to so construe the statute were it otherwise valid. But the fatal objection to the constitutionality of the statute, regarded from this point of view, is that it deprives McClellan of his right to a trial by jury. The constitutional provision that the right of trial by jury in cases where such mode of trial had hitherto prevailed is found in every constitution of the state that the people have at any time adopted. On a recent appeal to this court (*Malone v. St. Peter's & St. Paul's Church*, 172 N. Y. 269, 64 N. E. 691) to determine whether a certain character of action was referable or not, it was necessary for us to examine the state of the law prior to the Revolution to see if at that time the party had an absolute right to a trial by jury, for if he had the right was still extant. That actions to determine the title to public office were always, in this state and in England before our independence, triable before a jury is common knowledge: *People v. Albany & Susquehanna R. R. Co.*, 57 N. Y. 161. The Revised Statutes of 1830 declared that issues of fact on a writ of quo warranto should be tried in the same manner as in personal actions, i. e., by a jury; both the code of 1847 and the Code of Civil Procedure of 1877 expressly enumerate the action as triable before a jury. The special proceeding for the delivery of books and papers of an office does not violate this provision. In such a proceeding the court merely deals with the prima facie title of the applicant. It cannot go behind the certificate of election. It is plain that the contest for the present office will largely, if not principally, present questions of fact. The count of the votes now in one of the boxes may differ radically from the vote returned by the canvassers. The proof given may tend to show that the box has been preserved ⁴⁷⁰ inviolate, and, therefore, justify the admission of its contents in evidence. On the other hand, there may be evidence tending to show that the box was or could have been tampered with, and there may also be the testimony of the election inspectors and canvassers that on the night of the election the ballots in the box were exactly as returned by them in their statement of the count. The vital issue will then be what was the true count of the ballots on election night, and the exclusive determination of that question will belong to a jury. To have it so determined is the appellant McClellan's constitutional right.

The learned justice who wrote for the majority of the second appellate division thus answers the claim of McClellan to a jury trial: "If trial by jury were used in actions of quo warranto at the time of the adoption of our constitution, that secures that form of trial in such action or in any form of action or proceeding substituted for it: *People v. Albany & Susquehanna R. R. Co.*, 57 N. Y. 161. But under the common law and by statute such an action could only be brought by the sovereign. A contestant for an office could not bring any action or proceeding to oust the incumbent, or try the right to the office; and that has remained the case in this state down to the present time. In creating a new action or proceeding—one that did not exist when the constitution was adopted—for the trial of disputes of contestants of an election of (at?) the suit of a contestant, the legislature is free to make it summary or by jury trial. That has been generally held throughout the country, as appears by the decisions of other states, cited in the foregoing." The error of this reasoning lies just here: The learned justice has overlooked the difference between the situation of the contestant for an office and that of the incumbent of an office. As the learned judge writes, the title to an office could be challenged only by the sovereign, in this country the people, and it is a matter of grace on the part of the people or their legal representative to allow a suit to be brought on the relation of the contestant. Therefore, as a contestant has no constitutional right to bring⁴⁷¹ an action, it may be argued that he can have no right to have the trial of the action in any particular manner. Assuming the correctness of this proposition, it would be a perfect answer to any attack on the validity of the statute that the contestant might make, but we are at a loss to perceive its application to the case of the incumbent. McClellan was in office under a certificate of election entitling him thereto. In the only judicial proceeding known to the law, or that ever prevailed in the state, through which he could be ousted from office, he was entitled to a jury trial on the issues of fact. As is well said by the learned justice below in the excerpt already quoted: "If trial by jury were used in actions of quo warranto at the time of the adoption of our constitution, that secures that form of trial in such action or in any form of action or proceeding substituted for it." Giving the present statute the fullest force and effect as authorizing a judicial proceed-

ing, the most that can be said of it is that it is a "proceeding substituted for" quo warranto.

The learned counsel for the respondents relies on the provision of that portion of the third section of the act already quoted to relieve the statute from the objection of failure to provide for a jury trial: "Nothing in this act contained shall impair or affect any right under the constitution or laws of this state to question, by proceeding in the courts, the right or title of the candidate who shall, as a result of said recount, be declared elected; but there shall be no judicial review of any ballots which shall have been canvassed in the proceedings herein authorized." He urges that this leaves unimpaired the constitutional right of the incumbent to assert his title to office. If, however, there is to be no judicial review "of any ballots which shall have been canvassed in the proceedings," it is difficult to see that there is much left open to litigation in the quo warranto suit. True, if McClellan's eligibility to office, his residence, his age, his citizenship, were challenged, these matters would be open to litigation; but they are not challenged and the real issue in the case, the question who got the most votes at the election, will be foreclosed by the determination ⁴⁷² on the judicial recount. The learned counsel appreciates this and to obviate the difficulties suggests that to uphold the statute the court should strike therefrom the provision that there shall be no further judicial review of the ballots, under the well-known rule that if a part of a statute is valid and part is invalid, if the parts are separable, the valid part may be upheld though the invalid part be declared void. To make the elimination suggested would be to thoroughly emasculate the statute. If, however, we accede to the counsel's contention, what will be the result? The essence of a judicial proceeding is that it decides something and that its decision is conclusive on the parties. If we eliminate the provision that there shall be no judicial review of the ballots, it seems to us clear that the proceeding authorized by the statute is reduced to a mere canvass, pure and simple, and it at once runs counter to the constitutional provision for bipartisan boards. The only result of the proceeding would be a new canvass and a new certificate of election did the re-canvass differ from the original.

Now, at this point it becomes necessary to state an objection that we have to the constitutionality of this statute that goes beyond any that we have discussed. The results of the elec-

tion were canvassed and determined under the provisions of law then existing, and a certificate of election given to McClellan which conferred *prima facie* title to office, and under which he entered into the office of mayor. In this state *prima facie* title to elective office has always been conferred by certificates of election according to the results canvassed, and conclusive title has been the subject of determination by judicial proceedings. The incumbent holding the *prima facie* evidence of title has never been subject to be ousted in any other manner than by legal proceedings, members of the legislature alone excepted. It is true that the appellant McClellan has no property right in his office nor in the incumbency of his office during the term for which he was elected. In theory of law he holds the office for the benefit of the public, not for his own. It is possible that the office may now be ⁴⁷³ considered a constitutional one, for it is recognized in article 12, section 2 of the constitution of 1895; but whether considered a constitutional office or not, it is and has always been a local office which, under the constitution of 1846 and that of 1895, must be filled by election by the people or by appointment from local officers. It is not within the power of the legislature to have it filled in any other manner. It is true that no term is prescribed for the office by the constitution, and that the present incumbent might be legislated out of office by an act of the legislature changing the official term (*People v. Coler*, 173 N. Y. 103, 65 N. E. 956); but no other man can be legislated into office. As long as his official term has not been reduced by legislation, the appellant McClellan is entitled to hold the office until he is ousted as the result of a judicial determination, or is removed for misconduct. A canvass having been concluded under the statutory provisions for its conduct existing at the time, the legislature has no power to create a new tribunal with power to recanvass the election and to award possession of the office to another claimant. If such were its power the legislature might, except for the bi-partisan provision first found in the constitution of 1895, equally conduct the recanvass and make the determination itself. The result of such a doctrine would be appalling. Where the result of an election had been adverse to the party to which a majority of its members belonged, the legislature might by a subsequent statute authorize a recanvass of the election of the governor, of the judges of the courts, of the state officers and of the presidential electors,

who, in this state, are elected by the people. We hold that no such power exists. Of course the legislature may alter the form of judicial proceedings to try the title to office, making it as summary as possible, provided it retains the right of trial by jury, but we are speaking of a mere recanvass as distinguished from judicial proceedings.

It is unfortunate that the election in New York was so close as to leave doubts in many minds as to the accuracy of the result declared. The whole question, however, can be ⁴⁷⁴ tried and determined in the quo warranto suit now pending, and in that suit everything that is authorized or directed by the statute before us, opening the boxes, recount and the like, can be had, and it is not apparent why a determination cannot be as speedily reached in that action as by the proceedings authorized by this statute. It is also unfortunate that dilatory objections to the prosecution of that suit have apparently met with some success in the courts, but it would be far more unfortunate if, moved by any considerations of that character, or by the entirely natural desire of the electors of the city of New York to learn whether the result of the election of mayor was honestly and accurately declared, we should not only shut our eyes to plain constitutional provisions, but uphold the validity of a practice which might lead to infinite mischief in the future.

The order appealed from should be reversed and the writ of prohibition issue in each case, with costs to the appellants in both courts, but in one proceeding only.

O'Brien, Edward T. Bartlett, Haight, Vann, Hiscock and Chase, JJ., concur.

Order reversed, etc.

As to What Irregularities in an Election will invalidate it, see the note to Patton v. Watkins, 91 Am. St. Rep. 46.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

**SEEGERS BROTHERS v. SEABOARD AIR LINE RAIL-
WAY.**

[73 S. C. 71, 52 S. E. 797.]

CONSTITUTIONAL LAW—Railroads —Adjustment of Claims for Loss to Freight.—A statute providing that common carriers shall adjust freight charges and claims for loss or damage to freight within a named time, and that if this is not done they shall be liable to a penalty, is not unconstitutional as violative of the equality clause of the fourteenth amendment to the United States constitution, or of a similar provision in a state constitution. (p. 931.)

APPELLATE PRACTICE.—Findings of a Magistrate as to the amount of damages by loss to freight caused by a common carrier, if affirmed by the circuit court, cannot be reviewed by the supreme court if there is any evidence to support them. (p. 931.)

W. P. Pollock, for the appellants.

Stevenson & Mathison and E. McIver, for the appellee.

⁷¹ JONES, J. This action was commenced in a magistrate court for the county of Chesterfield to recover one dollar and seventy-five cents for loss or damage to freight, a bunch of bananas, shipped August 31, 1903, to plaintiffs at McBee, South Carolina, from Columbia, South Carolina, over defendant's line, and for fifty dollars penalty for failure to adjust and pay the said loss or damage within forty days, as required by the statute. The magistrate rendered judgment for the whole amount claimed, including ⁷² the penalty. On appeal to the circuit court, Judge Watts modified the judgment of the magistrate by reducing the amount of one dollar and seventy-five cents and costs, holding that the statute imposing the penalty is unconstitutional, under the rule stated in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 41 L. ed.

672. From this judgment plaintiffs appeal, and the main question presented is the constitutionality of said statute.

The statute in question is entitled "An act to regulate the manner in which common carriers doing business in this state shall adjust freight charges and claims for loss or damages to freight," and was approved February 23, 1904 (24 Stat. 81). Section 2 of said act, which more particularly concerns the present controversy, is as follows:

"Section 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days, in case of shipments from without this State, after the filing of such claim with the agent of such carrier at the point of destination of the shipment: Provided, That no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions ⁷³ of section 710, vol. 1, of the Code of Laws of South Carolina, 1902."

This section was under consideration in the case of *Best v. Seaboard Air Line Ry.*, 72 S. C. 479, 52 S. E. 223, in which the question presented was whether an action could be maintained for the penalty alone, when there had been voluntary payment and receipt of the loss or damage before suit, but after the expiration of the time named in the statute. This court held that such action could not be maintained. The court used this language: "The object of the statute was not to penalize the carrier for merely refusing to pay a claim

within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary." Under this view the common carrier is made liable for a penalty only in the event of a refusal to pay a claim for loss or damage to goods while in his possession, the bona fides and justice of the claim being established by a court of competent jurisdiction.

The present controversy requires the court to go more fully into the consideration of the purpose of the legislation in question, with a view to ascertain the reasonableness of the classification of common carriers as objects of this particular legislation. Common carriers receive from the state the right to carry on business in the state as such. They are by the state endowed with special powers and privileges which call for special duties and obligations to the public. It is a duty which a common carrier owes, not only under his contract, but under general law, to promptly and safely deliver goods consigned to him for transportation, and he is liable for all loss or damage to such goods while in his possession, not occasioned by the act of God or the public enemy. The duty to make prompt settlement for loss or damage to ⁷⁴ goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end. Whether the adoption of such means is wise, politic or adequate, is exclusively a legislative question, for the courts have nothing to do with the policy, wisdom or expediency of legislation. A statute cannot be declared void unless it manifestly violates some constitutional principle.

This statute is assailed as violative of the equality clause of the fourteenth amendment to the constitution of the United States and a similar provision in article 1, section 5, of the constitution of this state. The respondents, in argument here, and the circuit judge relied on the *Ellis* case, *supra*, to sustain the position that the statute is unconstitutional.

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within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary." Under this view the common carrier is made liable for a penalty only in the event of a refusal to pay a claim for loss or damage to goods while in his possession, the bona fides and justice of the claim being established by a court of competent jurisdiction.

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This statute is assailed as violative of the equality clause of the fourteenth amendment to the constitution of the United States and a similar provision in article 1, section 5, of the constitution of this state. The respondents, in argument here, and the circuit judge relied on the Ellis case, *supra*, to sustain the position that the statute is unconstitutional.

The Texas statute which was declared void in that case was as follows:

“Section 1. Be it enacted by the legislature of the State of Texas, That after the time that this act shall take effect, any person in this State having a valid bona fide claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed \$50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and ⁷⁵ obtain judgment for the full amount thereof, as presented for payment to such corporation in such Court, or any Court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorneys’ fees: Provided, He has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the Court or jury trying the issue.”

The difference between the Texas statute and our statute is manifest. The Texas statute subjects railway companies to a penalty, when successfully sued “on a claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, etc.” The relation of the railroad company to those who render it services or labor is the ordinary relation of employer and employé, and it may with some reason be said that there is no sufficient ground for making a distinction, such as would compel a railroad company to pay such ordinary claims for services within a given time under penalty, when no such obligation is imposed upon other employers to whom similar services are rendered. So the claims for damages may include claims not substantially different from claims for damages against individuals and corporations generally. So, also, when there

was no statute in Texas requiring railroad companies to fence their track against stock, it may be that it would be unreasonable to impose a liability for such acts different from, or greater than, the liability which should attach to the injury of stock by any other person or class. But we venture to say if the Texas statute had been confined to the regulation of some duty which particularly appertains to common carriers as such and imposed a penalty as a means of securing the performance of that duty, the decision of the court would have been different. The supreme court of Texas had considered the statute as a whole, and had declared it was intended to compel the payment of debts. So considering it as a whole, the court treated it simply as a statute singling out railroad corporations alone and imposing upon them a penalty for failure to pay certain debts.

In the case of Atchison etc. Ry. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. Rep. 609, 610, 43 L. ed. 309, the court held that a Kansas statute requiring reasonable attorney's fee for the plaintiff in a recovery against the railroad company for damages from fire caused by operating its train did not violate the fourteenth amendment. In the Matthews case, the court reviewed the Ellis case, and called attention to the fact that the Texas statute was treated as a whole by the Texas court, and was so treated by the supreme court of the United States. The court said: "It is true that the Ellis case was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock and the protection of stock from moving trains would, within the foregoing principles, uphold legislation imposing an attorney's fee in actions against railroad corporations. We were not insensible to this argument when that case was considered, but we accepted the interpretation of the statute and its purpose given by the supreme court of Texas, as appears from this extract from our opinion: 'The supreme court of the state considered this statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts.' " The court further said: "So that, according to the interpretation placed upon the Texas statute by its supreme court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for

stock killed, was not sufficient to justify us in separating the statute into fragments, and upholding one part on the theory inconsistent with the policy of the state, while, on the other hand, the purpose of this statute is, as declared by the supreme court of Kansas, protecting against fire—a matter in the nature of a police regulation.” The court further said: “It is the essence of a classification” that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit, it must pay, not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its livestock, it could, under no circumstances, recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality. Our conclusion in respect to this statute is that, for the reasons above stated, giving full force to its purpose as declared by the supreme court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the supreme court of Kansas is affirmed.”

In the case of *Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. Rep. 819, 820, 44 L. ed. 897, it was held that an exception of a dummy railroad operated by steam, or of an electric railroad, from an ordinance limiting the speed of railroad trains within the city, does not make an unreasonable classification in denial of the equal protection of the laws. Responding to the suggestion that there was testimony that the operation of the street railway was in fact more dangerous than the

⁷⁸ operation of the railroad in the hands of plaintiff, receiver, the court said: "It is not a question to be settled by the opinion of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is, that there is a difference, and, that existing, it is for the city council to determine whether separate regulations shall be applied to the two. . . . Given the fact of a difference, it is a part of the legislative power to determine what difference there shall be in the prescribed regulations."

In the case of *Fidelity Mut. L. Assn. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. Rep. 662, 46 L. ed. 922, over a strong dissenting opinion by Mr. Justice Harlan, in which Mr. Justice Brown concurred, pointing out that the decision was in conflict with the *Ellis* case, the court nevertheless held that a Texas statute imposing upon life and health insurance companies, upon failing to pay a loss within the time specified in the policy, after demand therefor, a liability to the holder of the policy, in addition to the amount of loss, of twelve per cent damages and reasonable attorneys' fees, did not deny the equal protection of the law to such life and health insurance companies, although such an obligation was not imposed upon other classes of insurance companies or associations. This decision was reviewed in *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. Rep. 133, 47 L. ed. 204, and the court expressed satisfaction with the case and its reasoning. In the *Mettler* case, the court said: "The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statute, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits), and lodges and associations ⁷⁹ of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured."

It appears to us that there is even stronger reason for sustaining a classification of all common carriers of freight, for legislation with respect to their quasi-public duties as such, having also in mind the necessity of the prompt payment of losses sustained by failure to perform said duty, as in many cases such losses represent food, raiment and other necessities of life.

In the case of *Farmers' and Merchants' Ins. Co. v. Dabney*, 189 U. S. 301, 23 Sup. Ct. Rep. 565, the court held valid a Nebraska statute allowing a reasonable attorney's fee to a plaintiff in case of an unsuccessful defense by an insurance company of a suit on a policy of insurance covering real property wholly destroyed by fire. We quote the following from that case as a complete answer to the suggestion of inequality in the case at bar in the classification of common carriers for special legislation of the kind in question, and the suggestion of inequality because the penalty falls upon the common carrier when unsuccessful in the suit, but not upon the claimant when he is unsuccessful in the suit. The court said: "All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the fourteenth amendment are embraced in the following propositions: First, because it arbitrarily subjects insurance companies to a liability for attorneys' fees, when other defendants in other classes of cases are not subjected to such burden; second, because, whilst the obligation to pay attorneys' fees is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully ^{so} defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property, or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generally considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance, as between themselves, may not be classified sepa-

rately depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudications of this court''; citing cases.

The case of *Missouri etc. R. R. Co. v. May*, 194 U. S. 267, 24 Sup. Ct. Rep. 638, 48 L. ed. 971, is an interesting and striking case. In that case, the court held that a Texas statute imposing a penalty in favor of contiguous land owners against railway companies for permitting Johnson grass or Russian thistle to mature and go to seed upon their road, does not deny such railway companies the equal protection of the law. It might be suggested that Johnson grass is a curse or a blessing according to the view point, a curse as to crops requiring clean cultivation, a blessing when hay is the thing wanted; or it might be suggested that Johnson grass could easily be communicated to the railway company's land or right of way by streams from bottom lands above; or that it might be propagated from seed dropped upon the ordinary highways from wagons hauling such hay, thence to lands adjoining, thence to the railway company's lands, thence to contiguous lands, but no such penalty applies against other carriers, against those in charge of ordinary highways, against a contiguous land owner, in favor of the railway company, or as between contiguous land owners.

⁸¹ It will be further observed that the legislation affected the railway company in its capacity as owner or occupant of the land or right of way. But the court was guided in the decision of the case by these sound principles:

"When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. . . . Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

This court, in *Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, held that the statute

making telegraph companies liable for mental anguish is not violative of the fourteenth amendment, or article 1, section 5 of the state constitution, and in *Johnson v. Spartan Mills*, 68 S. C. 355, 47 S. E. 695, this court held that section 2719, making it lawful for any corporation, person or firm to issue, pay out or circulate for payment for the wages of labor, any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, except upon conditions specified in the act, did not violate the fourteenth amendment, and was upon a reasonable classification, even though it contained a proviso that said section shall not apply to agricultural contracts or advances made for agricultural purposes.

In the case of *Porter v. Charleston & S. Ry. Co.*, 63 S. C. 169, 90 Am. St. Rep. 681, 41 S. E. 108, this court held that the act (22 Stat. 443) imposing a penalty on common carriers for failure to pay or refuse to pay damages, etc., to freight within sixty days does not violate those sections of the state and federal constitutions providing for equal protection to all. This court distinguished that case from the *Ellis* case in two particulars, ⁸² viz.: 1. That the South Carolina statute of 1897 applied to all common carriers, while the Texas statute, condemned in the *Ellis* case, was limited to one class of common carriers, railway corporations; 2. That the South Carolina statute was limited to such claims as were peculiarly incident to the business of a common carrier, but the Texas statute was not so limited.

The statute considered in the *Porter* case was, in *Johnson v. Southern Ry.*, 69 S. C. 322, 48 S. E. 260, held to be repealed by the act of 1903, which is now under consideration. But the principle decided in the *Porter* case is just as applicable in the present case. A valid distinction cannot be based upon the difference between a requirement "to pay or refuse to pay" within a given time, as provided in the act of 1897, and a requirement "to pay" within a given time, as required in the act of 1903, for if it be unlawful to require the latter, under penalty, it must also be unlawful to require the former, since no other person or class is required "to pay or refuse to pay" under penalty. The decision rests upon the reasonableness of the classification of common carriers for particular legislation with respect to the performance of their duty as such, thereby subserving an important public purpose within the police power of the state.

From this review of the decisions of the supreme court of the United States and of this court, we think it is clear that the statute is not unconstitutional.

The respondent, in the event of the above conclusions being reached, has upon notice and exceptions taken asked that this court consider whether the judgment of the circuit court should not be affirmed upon the ground that the magistrate erred in finding judgment for the penalty, when the testimony showed that the claim filed by plaintiff for one dollar and seventy-five cents was made up of two items, to wit, one dollar and fifty cents, the value of the property alleged to have been lost or damaged while in possession of defendant, and twenty-five cents, freight paid by plaintiff for same. The magistrate having found as a fact that the amount of the loss or damage ⁸³ was one dollar and seventy-five cents, as claimed, and this conclusion having been affirmed by the circuit court by sustaining the magistrate's judgment to that extent, we have no power to review or reverse such conclusion of fact, unless there was absolutely no evidence tending to sustain it. It was shown that the cost of the bunch of bananas in Columbia, South Carolina, was one dollar and fifty cents and the freight thereon to McBee, South Carolina, was twenty-five cents. This was certainly some evidence that the value of the bananas to plaintiffs at McBee was at least one dollar and seventy-five cents, and that such was the amount of their loss. The magistrate having adjudged the loss to be as claimed by plaintiffs, judgment for the penalty was proper.

The judgment of the circuit court is reversed, and the judgment of the magistrate court is affirmed.

The chief justice did not participate in this opinion because of illness.

By Writ of Error the Judgment in the Principal Case was taken for review to the supreme court of the United States, where it was affirmed: *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. Rep. 28, 52 L. ed. 28. The opinion of affirmance written by Mr. Justice Brewer is as follows:

"The question in this case is the constitutionality of section 2 of an act of the state of South Carolina, approved February 23, 1903 (24 Stats. at Large, 81), which reads:

" 'Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state,

and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, that no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved, in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, volume 1, of the Code of Laws of South Carolina, 1902.'

"The difference between the value of the goods shipped and the freight charges, one dollar and seventy-five cents, and the amount of the penalty, fifty dollars, naturally excites attention. The supreme court of the state held the section constitutional—a decision conclusive so far as the state constitution is concerned—and therefore we are limited to a consideration of its alleged conflict with the constitution of the United States. The shipment was wholly intrastate, being from Columbia, South Carolina, to McBee, South Carolina, and undoubtedly subject to the control of the state. It is, of course, unnecessary to consider the validity of the statute when applied to a shipment from without the state.

"It is contended that the equal protection of the laws, guaranteed by the first section of the fourteenth amendment, is denied. The power of classification is conceded, but this will not uphold one that is purely arbitrary. There must be some substantial foundation and basis therefor. It is asserted that this is merely legislation to compel carriers to pay their debts within a given time, by an unreasonable penalty for any delay, while no one else is so punished, and that there is no excuse for such distinction. We have had before us several cases involving classification statutes, and while the principles upon which classifications may rightfully be made are clear and easily stated, yet the application of those principles to the different cases is often attended with much difficulty. See, among others, on the general principles of classification, *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892; and of cases making application of those principles: *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed.

666; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. Rep. 609, 43 L. ed. 909, and cases cited in the opinion; Erb v. Morasch, 177 U. S. 584, 20 Sup. Ct. Rep. 819, 44 L. ed. 897; Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308, 22 Sup. Ct. Rep. 662, 46 L. ed. 922; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. Rep. 565, 47 L. ed. 821; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 24 Sup. Ct. Rep. 638, 48 L. ed. 971.

"We are of the opinion that this case comes within the limits of constitutionality. It is not an act imposing a penalty for the nonpayment of debts. As the supreme court of South Carolina said in *Best v. Seaboard Air Line R. Co.*, 72 S. C. 479, 484, 52 S. E. 223, 225: 'The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in a court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary.'

"This ruling of the supreme court finds support, if any be needed, in the preamble of the statute, which reads: 'An Act to Regulate the Manner in Which Common Carriers Doing Business in This State Shall Adjust Freight Charges and Claims for Loss of or Damage to Freight.'

"It is not an act leveled against corporations alone, but includes all common carriers. The classification is based solely upon the nature of the business, that being of a public character. It is true that no penalty is cast upon the shipper, yet there is some guaranty against excessive claims in that, as held by the supreme court of the state in *Best v. Seaboard Air Line R. Co.*, supra, there can be no award of a penalty unless there be a recovery of the full amount claimed.

"Further, the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else, and for the adjustment of loss or damage to shipments within the state forty days cannot be said to be an unreasonably short length of time. It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty

within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification.

“While in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. If a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute, and yet justice requires that his claim be adjusted and paid with reasonable promptness. Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go even in cases where classification is legitimate; but we are not prepared to hold that the amount of penalty imposed is so great, or the length of time within which the adjustment and payment are to be made is so short, that the act imposing the penalty and fixing the time is beyond the power of the state.

“The judgment of the supreme court of South Carolina is affirmed.

“Mr. Justice Peckham dissents.”

WEAVER v. SOUTHERN RAILWAY COMPANY.

[76 S. C. 49, 56 S. E. 657.]

NEGLIGENCE—When Question for Jury.—The issue of negligence should go to the jury when the facts, which, if true, would constitute evidence of negligence, are controverted, or when the facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn, or when the facts are in dispute and the inferences to be drawn therefrom are doubtful. (pp. 936, 937.)

TRIAL—Instructions.—A request for a charge which intimates to the jury the inference to be drawn from the facts therein stated in detail is a charge on the facts and should not be given. (p. 937.)

RAILROADS—Negligence—Crossings—Gates and Signals.—The lowering of gates across the street, where a railroad company is required to keep gates closed while a train is crossing, is a warning of the dangerous condition of the track at the time, but it does not dispense with the necessity of complying with statutory requirements as to ringing the bell or sounding the whistle, at least thirty seconds before an engine is moved, when it is at a standstill within a less distance than one hundred rods of the crossing. (p. 939.)

RAILROADS—Negligence—Crossings—Gates.—Although the lowering of gates across the street while a railroad train is passing does not supersede the necessity of complying with statutory re-

quirements as to sounding a whistle or ringing a bell, nevertheless when the warning which the lowering of such gates gives is ignored, it strongly tends to show gross negligence on the part of the person injured. (p. 939.)

Sanders & DePass, for the appellant.

Nichols & Jones and S. Wilson, for the appellee.

⁶¹ GARY, J. This is an action for damages alleged to have been sustained by the plaintiff while climbing between two freight-cars across a street in the city of Spartanburg.

The facts are thus set out in the complaint: "That on the twentieth day of June, 1903, the defendant negligently and unlawfully allowed one of its trains to stop for an unreasonable time, fifteen or twenty minutes, across Magnolia street, one of the principal streets of the city of Spartanburg, to the great inconvenience and annoyance of those using the street, including this plaintiff, in violation of his right to said street, and in violation of the ordinance of said city which prohibited the blocking of said public crossing for a longer period than five minutes.

"That on said day plaintiff was going along said street, and coming to said crossing found it blocked, as aforesaid, by defendant's train. That after waiting a considerable time, the train not moving, and plaintiff being anxious to get out of the rain, also being very unwell, he had to go over said crossing and along said street by going between two of the cars of said train over the bumpers, which were standing motionless as aforesaid. That while in such act, without any notice or warning, without sounding a whistle or ringing a bell, disregarding the statute law of this state, the defendant company, through its agents and servants in charge of said train, negligently, unlawfully, recklessly, wantonly, and in utter disregard of plaintiff, caused said train of cars to suddenly and quickly start and move, thereby throwing him down upon its railroad track, running its wheels over his foot, crushing and mangleing it and cutting it off, to his great suffering and injury, and to his damage in the sum of two thousand dollars."

The defendant denied all the allegations of the complaint except the corporate existence of the defendant and the injury ⁶² of the plaintiff while climbing between the cars, and alleged that "on the occasion named it was carrying on its business in a lawful way in its yard in the city of Spartan-

burg, and that while so doing, and after the gates were down—which said gates, under the ordinances of the city of Spartanburg, it was required to keep, maintain and operate across its streets when trains were on said streets—the plaintiff herein, after he knew, or ought to have known, that said gates were down, carelessly and negligently attempted to pass between two of the defendant's cars, to which an engine was hitched, and after he knew that it was likely that said cars would be moved at any moment, and while so doing, in a careless and negligent manner, was injured by the movement of said train in a lawful manner, and that the injury which was received by plaintiff on the said occasion was caused by his own carelessness and negligence in attempting to pass between the two said cars, after he knew, or could have known by the exercise of ordinary and due care and caution, that said train would likely move at any moment, and after due warning had been given that the train, which was then on and across said streets, was there only temporarily, and that it was the intention that the same should be moved at any moment, and that the carelessness and negligence of the plaintiff in so attempting to pass between the said cars, which he knew, or ought to have known, was a dangerous act, caused and contributed to the injury aforesaid."

The jury rendered a verdict in favor of the plaintiff for five hundred dollars, whereupon the defendant appealed upon exceptions which will be incorporated in the report of the case.

The first question that will be considered is whether his honor, the presiding judge, erred in ruling that the plaintiff could introduce evidence to the effect that other persons climbed between the cars and why they did so. The appellant's attorneys realize the fact that the case of *Thomasson v. Southern Ry.*, 72 S. C. 1, 51 S. E. 443, sustains said ruling, but asked permission, which was granted, ⁶³ to review that case. After careful consideration, the court adheres to its former ruling.

The next question for consideration is whether the presiding judge erred in refusing certain requests mentioned in the exceptions on the ground that they were a charge upon the facts. The rule when facts should be submitted to the jury is thus clearly stated in 16 American and English Encyclopedia of Law, 465 et seq., and quoted with approval in *Rinake v. Victor Mfg. Co.*, 55 S. C. 179, 32 S. E. 983, and *Wood v. Victor Mfg. Co.*, 66 S. C. 482, 45 S. E. 81, to wit:

“The general rule is well known that questions of fact are to be submitted to the jury, and this includes not only cases when the facts are in dispute, but also when the question is as to inference to be drawn from such facts after they have been determined. It will readily be observed that few cases will arise in which there is no question as to the facts involved; the element of ordinary care must from its very character always require the decision of a jury, except where there is a violation of statutory duty or when the facts are undisputed and but one inference can be reasonably drawn from them. And the same is equally true as to the determination of the question of proximate cause, so that the following rules may be stated as applicable to every case. The issue of negligence should go to a jury: 1. When the facts, which, if true, would constitute evidence of negligence, are controverted; 2. When such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn; 3. When the facts are in dispute and the inferences to be drawn therefrom are doubtful.”

In *Lampley v. Atlantic C. L. R. R.*, 71 S. C. 156, 50 S. E. 773, the court says: “Negligence is a mixed question of law and fact. It is the duty of the court to define negligence, but the jury must draw the inference from the facts in each case.”

⁶⁴ The presiding judge could not have charged the said requests without intimating to the jury the inference to be drawn from the facts therein so carefully set out in detail. The instructions would have been in violation of article 5, section 26 of the constitution, and were, therefore, properly refused.

We proceed, next, to consider whether there was error on the part of the presiding judge in construing sections 2132 and 2139 of the Code of Laws, which are as follows:

“Sec. 2132. A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded, by the engineer or fireman, at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place; and if such engine or cars shall be at a standstill within a less distance than one hundred rods of such crossing such bell shall be rung, or such

whistle sounded, for at least thirty seconds before such engine shall be moved; and shall be kept ringing or sounding until such engine shall have crossed such public highway or street or traveled place."

"Sec. 2139. If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such conduct contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contributed to the injury."

⁶⁵ The first assignment of error is, that the presiding judge ignored the provision of the statute, which requires the plaintiff to prove, not only the failure of the defendant to comply with the statute, but that such failure contributed to the injury as a proximate cause.

At the time the circuit judge used the language set out in the exceptions, he was not specially discussing this feature of the statute, but the effect of a lack of ordinary care and gross negligence on the part of a person injured at a crossing.

He, however, charged the defendant's first request, which was as follows: "Proof of the mere failure to ring the bell or sound the whistle, as required by the statute, before moving cars which may be across a street is not of itself sufficient to warrant a recovery for an injury received by one while attempting to climb over or between two of such cars, but in order to warrant such recovery the evidence should go farther and show that this failure to give the signals required by the statute contributed as a proximate cause to the injury complained of, and if the evidence does not show not only that the signals were not given, but that the failure to give them did contribute as a proximate cause to the injury, then there can be no recovery and the verdict should be for the defendant."

The last question for determination is, whether the circuit judge erred in charging that if the defendant failed to com-

ply with the foregoing statutory requirement the plaintiff was entitled to recover, unless it was shown that he was guilty of gross or willful negligence or was acting in violation of law, and that such negligence or violation of law contributed to the injury.

The appellant, in effect, contends that the lowering of the gates gave warning of the dangerous condition of the track and dispensed with the necessity to comply with the statutory requirements as to ringing the bell or sounding the whistle at least thirty seconds before the engine was moved when it was at a standstill, within a less distance than one ~~66~~ hundred rods of the crossing; and that the plaintiff under such circumstances cannot recover if he failed to exercise ordinary care, and such failure contributed to the injury.

There are cases in which the law will dispense with the necessity for compliance with the statutory signals at a crossing; and then it is not necessary for the railroad company to show that the party injured was guilty of gross negligence or was acting in violation of the law; as, for instance, when a person sees the train approaching a crossing in ample time to avoid the danger of a collision. The reason is because he possesses all the information which the ringing of the bell or the sounding of the whistle was intended to give.

The vital question in this case, therefore, is, whether the lowering of the gates afforded the plaintiff the information which the ringing of the bell or the sounding of the whistle for thirty seconds before the train moved would have given him.

The lowering of the gates was a general warning of danger at that time in attempting to cross the track, but it did not give any specific information as to the time when the train would move. While, on the other hand, the statute was intended to inform those about to use the crossing of the specific fact that the train would not move within thirty seconds.

A person who sees a train across a highway knows that it is dangerous to attempt to cross the track at that time; and while the lowering of the gates accentuated this fact, it does not give any particular information.

Therefore, the notice arising from the lowering of the gates did not afford protection equal to that intended by the statute, and does not supersede the necessity for complying with its requirements.

Although the erection of the gates did not supersede the necessity of complying with the requirements of the statute, nevertheless when the warning which they give is ignored, ⁶⁷ it strongly tends to show gross negligence on the part of the person injured.

These views practically dispose of all the questions presented by the exceptions.

It is the judgment of this court that the judgment of the circuit court be affirmed.

Per CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question of law or fact has been overlooked or disregarded.

It is therefore ordered that the petition be dismissed and the order herein granted staying the remittitur be revoked.

In the Case of Thomasson v. Southern Ry. Co., 72 S. C. 1, 51 S. E. 443, referred to in the principal case, it was decided that in an action to recover for injury sustained at a street crossing which had been blocked by a railroad train, for a time longer than that permitted by ordinance, evidence is admissible to show that the person injured and others were laborers, who at the time of the accident had only a few moments in which to return to their work, and that plaintiff's foot was crushed while he was attempting to pass between the standing cars.

The Law Requires Railroad Companies to give notice of trains approaching a crossing. What such notice shall be will to some extent depend upon the circumstances of each case, but some suitable means must be adopted and applied which will apprise travelers of the danger of the situation: See Bickel v. Pennsylvania R. R. Co., 217 Pa. 456, 118 Am. St. Rep. 926, and cases cited in the cross-reference note thereto; Queen Anne's R. R. Co. v. Reed, 5 Penne. 226, 119 Am. St. Rep. 301. Safety gates at a crossing, if standing open, are an invitation to a traveler on the highway to cross; and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances: Messinger v. Pennsylvania R. R. Co., 215 Pa. 497, 114 Am. St. Rep. 970.

**SUMTER TOBACCO WAREHOUSE COMPANY v.
PHOENIX ASSURANCE COMPANY.**

[76 S. C. 76, 56 S. E. 654.]

INSURANCE.—Temporary Increase in Risk forbidden by a policy of fire insurance does not avoid it when the increase of hazard has come to an end without loss, and the loss occurs from another cause. (p. 943.)

CORPORATIONS—Evidence of Incorporation.—The original charter for a corporation, duly certified, is the highest evidence of the incorporation. (p. 944.)

CORPORATIONS—Change in Name—Right to Attack for.—An irregularity in not complying with the law in changing the name of a corporation is available only in a direct proceeding to annul its charter, instituted on behalf of the state. (p. 945.)

CORPORATIONS—Deed to Before Charter Granted—Change in Name—Insurance—Estoppel.—A deed to a corporation made before its charter is granted will take effect as soon as its charter is obtained, although there is a slight change in the name of the corporation from that mentioned in the deed, and an insurance company cannot raise this objection to the validity of the deed, when it has issued its policy and received its premium from a person as owner of the property. (p. 945.)

J. T. Seibels and Haynesworth & Haynesworth, for the appellant.

Lee & Moise, for the appellee.

78 WOODS, J. This appeal is from a judgment recovered by the plaintiff on a policy of insurance issued by the defendant insurance company covering a "two-story frame shingle roof prizery," the property having been destroyed by fire on July 11, 1903.

The defense on the merits was under the following provisions of the policy: "This entire policy, unless provided by agreement indorsed hereon or added hereto, shall be void . . . if the hazard be increased by any means within the control or knowledge of the insured." "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto . . . shall be void if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise."

The specific violation of these conditions alleged as avoiding the policy was that the plaintiff had changed the possession and increased the hazard by renting the building to

a tenant who used it by permission of the plaintiff, and without ⁷⁹ the knowledge or consent of the defendant, in making and renovating mattresses, a business more hazardous than conducting a tobacco prizery, which was the business mentioned in the policy.

We consider first the exception which charges error in the instruction: "If the jury believe that the possession of the property insured was delivered to a tenant who occupied the property with an increased hazard, and if the jury believe that the occupation was temporary and ceased before the fire, then such occupation would not prevent a recovery, if it was contemplated and agreed between the parties that there should be a temporary use of it." The same point was made in other exceptions to the charge by request to direct a verdict and by motion for a new trial.

Stating the evidence as to change of possession and increase of hazard most favorably to the defendant, it is manifest such change and increased hazard was only temporary, had ceased before the fire occurred and had no connection with it. Ryttenberg, plaintiff's agent, about a month prior to the fire, agreed to rent the property to one Potter, a maker and renovator of mattresses. Potter went into possession and placed a steam engine just outside of the building, which a witness on one occasion saw fired up ready for use in the mattress business; but on finding the building not suited to his purposes, Potter moved out after an occupancy of only two or three days. Ryttenberg seems to have supposed Potter was still in possession at the time of the fire, as he so stated in his proof of loss. In this statement of the facts, all evidence objected to by the defendant has been left out of view; and if a temporary change of possession increasing the risk while it lasts, but discontinued before the fire, does not totally avoid the policy, but merely suspends it during the prohibited use, the provisions of the policy above quoted cannot avail the defendant.

On this point the authorities are in hopeless conflict. Some courts of high authority hold the policy to be finally ⁸⁰ avoided by such temporary increase of hazard: *Mead v. Insurance Co.*, 7 N. Y. 530; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 13 Am. St. Rep. 582; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 19 Am. St. Rep. 77, 24 N. E. 727, 9 L. R. A. 81; *German Ins. Co. v. Russell*, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234. The precise point has not been decided by the su-

preme court of the United States, but the case of *Kyte v. Commercial Assur. Co.*, 149 Mass. 116, 21 N. E. 361, is cited with approval in *Imperial etc. Ins. Co. v. Coos County*, 151 U. S. 451, 14 Sup. Ct. Rep. 379, 28 L. ed. 231. The issue in the last-mentioned case, however, was not to the effect of a temporary change, but of a permanent change due to the material alterations of the building without the consent of the insurer. In *Liverpool L. & G. Ins. Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. Rep. 306, 29 L. ed. 575, the prohibited hazard was in existence at the time of the fire, and the exact point here under consideration was not involved. The reasoning in *Kyte v. Commercial Assur. Co.*, the Massachusetts case just referred to, is that unless the policy be regarded at an end the moment the hazard is increased, the insurance company would be held to furnish insurance for which it had not received the consideration it was entitled to demand and which with knowledge of the facts it would have demanded. But this reasoning seems fallacious, for the insurer is generally held to be not liable at all if the fire occurs during the continuance of the increased risk and in consequence of it.

The contract of insurance must, like other contracts, be enforced according to its terms. In construing such contracts, however, courts should endeavor to ascertain from the language used, in the light of the surrounding circumstances and the nature of the business, the safeguards which the parties intended to place around themselves. It may be reasonable to suppose an insurance company would desire to reserve the valuable right of canceling a policy even on a temporary increase of hazard if known to it at the time, because such damage might result in loss; but it is not reasonable to impute to it a purpose or desire to curtail its own revenue by canceling a policy on account of a temporary increase of hazard which has come to an end without ⁸¹ loss and from which it could not possibly suffer detriment. Hence there may be ground for holding a temporary increase of hazard forbidden by the policy to avoid the insurance without action or even knowledge on the part of the company when the loss resulted from that cause, but there is no ground for such a holding when the increase of hazard came to an end without loss. The greater weight of authority supports this conclusion: *Wetmore v. Insurance Co.*, 32 Ill. 221; *Catlin v. Insurance Co.*, 163 Ill. 256, 45 N. E. 255, 25 L. R. A. 595; *Born v. Home Ins. Co.*, 110 Iowa, 379, 80 Am. St. Rep.

300, and note, 81 N. W. 676; Phoenix Ins. Co. v. Lawrence, 4 Met. 9, 81 Am. Dec. 521; United States F. & M. Ins. Co. v. Ramberly, 34 Md. 224, 6 Am. St. Rep. 325; Angier v. Western Assur. Co., 10 S. Dak. 82, 66 Am. St. Rep. 685, and note, 71 N. W. 761; Doud v. Citizens' Ins. Co., 141 Pa. 47, 23 Am. St. Rep. 263, 21 Atl. 805, 45 L. R. A. 204; Adair v. Southern M. I. Co., 107 Ga. 297, 73 Am. St. Rep. 122, 33 S. E. 78; Springfield F. & M. I. Co. v. Wade, 95 Tex. 598, 93 Am. St. Rep. 870, 68 S. W. 977, 58 L. R. A. 714; North B. M. I. Co. v. Union Stockyards Co., 27 Ky. Law Rep. 852, 87 S. W. 285; Springfield F. & M. I. Co. v. McLemans, 28 Neb. 846, 45 N. W. 171; Gates v. Madison County Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360.

While in the case of Leggett v. Insurance Co., 10 Rich. 202, stress was laid on the fact that the action was for insurance on a stock of goods and not on the building in which they were contained, and that, therefore, some of the provisions of the policy similar to those here under consideration had no application, yet in that case the court of appeals approved a charge to the effect that an increase of risk permanent and continuous took away the benefit of the policy, even though it did not produce the loss, but that "an occasional temporary increase of risk took away only the right to complain of loss which it had occasioned, and did not affect the right to recover for a loss with which it was in no way concerned."

Some of the cases above cited from other states seem to go to the extent of holding that a temporary increase of hazard would not prevent a recovery on the policy even where the fire was occasioned by the increased hazard. As to that question we express no opinion as it is not involved in this case.

⁸² It follows from this discussion that the plaintiff was entitled to recover without respect to the question of waiver, on the facts as proved by the defendant, unless there is some material error as to another defense set up by the defendant.

In proving title to the property plaintiff offered in evidence a deed from William Moran to the Sumter Tobacco and Cotton Warehouse Company, and a charter issued by the Secretary of State to the Sumter Tobacco Warehouse Company, the charter reciting that the original declaration set forth the name of the corporation as the Sumter Tobacco and Cotton Warehouse Company, but this name had been changed to the Sumter Tobacco Warehouse Company. The objection made to the admission of this charter on the ground that section 1884 of Civil Code allows a certified copy of the charter to be received

in evidence, and, therefore, the original charter duly certified was inadmissible, is so obviously without force that it requires no consideration. The original charter duly certified is of the highest evidence of the incorporation. The defendant could not avail itself of any alleged irregularity in complying with the law in changing the name of the corporation, because under section 1885 of Civil Code such irregularity is available only in a direct proceeding to annul the charter instituted on behalf of the state.

One of the grounds of the motion for a new trial was that the deed of conveyance to the Sumter Tobacco and Cotton Warehouse Company conveying the lot on which the building stood was insufficient to prove title to the Sumter Warehouse Company. The deed was dated January 16, 1896, after the declaration looking to the charter of the Sumter Tobacco and Cotton Warehouse Company had been filed, but before the charter was actually issued in the name of the Sumter Tobacco Warehouse Company. It is the duty of courts to give effect to deeds made in good faith rather than destroy them on technical grounds. A deed to a corporation made before the charter will have effect as soon as the charter is obtained, on the ground that ⁸³ its acceptance should be presumed as soon as the corporation is competent to accept it: 4 Thompson on Corporations, 5114, 5115. The slight change in the name of the corporation can make no difference. Certain it is that Moran, the grantor, would not be heard to allege against the validity of the deed on the ground taken by the defendant; and for a greater reason the defendant company, which had no interest in the land, after having issued its policy and having received its premium from the plaintiff as the owner of the property, cannot be allowed to do so. It would needlessly lengthen this opinion to review the cases relied on by the defendant; they are all different in their facts and are not applicable to this case. To hold that the slight change in the name of the corporation should defeat the deed would be to refuse to regard the intention of all parties concerned for the sake of an attenuated technicality.

It is the judgment of this court that the judgment of the circuit court be affirmed.

A Fire Insurance Company is liable if the premises are occupied when they are burned, although they may have been vacant during the life of the policy. The insurance is revived by the occupancy,

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though suspended during the vacancy: *Insurance Co. v. Pitts*, 88 Miss. 587, 117 Am. St. Rep. 756. The temporary cessation of a mill for want of water-power does not avoid the insurance thereon: *Waukan Mill Co. v. Citizens' etc. Ins. Co.*, 130 Wis. 47, 118 Am. St. Rep. 998; and the mortgaging of insured property does not avoid the policy, provided the mortgage is discharged prior to a loss: *Born v. Home Ins. Co.*, 110 Iowa, 379, 80 Am. St. Rep. 300, and see the note thereto.

COOPER v. RICHLAND COUNTY.

[76 S. C. 202, 56 S. E. 958.]

NEGLIGENCE—Proximate Cause.—If a horse while being driven along a public highway and across a bridge catches his foot in a hole or break in the bridge, from which he cannot extricate it, his position is the direct and proximate result of the negligence of the county, and if the owner, acting as a reasonable and prudent man, goes to the assistance of his horse, and in attempting to rescue him is himself injured by the horse falling on him, his injury is also the proximate result of the negligence of the county. (p. 948.)

NEGLIGENCE—Proximate Cause.—Under a statute relating to liability for defects in highways, and providing that plaintiff shall not recover when he has in any way brought about the injury or damage by his own act, to bar a recovery the act of the person injured must be the efficient, immediate, and proximate cause of the injury. (p. 949.)

F. G. Tompkins and E. M. Clarkson, for the appellant.

Thomas & Thomas, for the appellee.

203 GARY, J. This is an action under section 1347 of the Code of Laws, which is as follows: "Any person who shall receive bodily injury or damage in his person or property through a defect or in the negligent repair of a highway, causeway, or bridge, may recover in an action against the county, the amount of actual damage sustained by him by reason thereof: Provided, Such person has not in any way brought about such injury or damage by his own act, or negligently contributed thereto. If such defect in any road, causeway, or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured, if his load exceeded the ordinary weight: Provided, further, That such county shall not be liable unless such defect was occasioned by its neglect or mismanagement."

The material allegations of the complaint are: That while the plaintiff was being driven in his buggy along the public

highway and across the bridge his horse caught his foot in a hole or break in the bridge, which became so firmly fastened that it became necessary for the plaintiff to go to the assistance of his horse in order to extricate his foot, and that while plaintiff was trying to get his horse out of said hole, the horse fell upon the plaintiff and thereby broke his leg; and that the said injury was caused by the negligent failure of the county to keep the said bridge in repair. That the injuries sustained by the plaintiff were caused by the negligence and mismanagement of the defendant as above set out, and without any negligence on the part of the plaintiff, nor did he negligently contribute thereto.

The defendant demurred to the complaint on the following grounds: "1. It does not appear therein that the proximate cause of plaintiff's injury was a defect in the repair of a highway or bridge; it appearing, on the contrary, that the proximate ²⁰⁴ cause of plaintiff's injury was his own act in trying to extricate his horse's foot from a hole in the bridge, in which it had become fastened, his horse falling upon him while so engaged, and thus causing his injury, for which injury so caused defendant is not liable; 2. It is not alleged therein that the plaintiff did not in any way bring about his injury or damage by his own act, nor negligently contribute thereto."

Both grounds of demurrer were sustained and the complaint dismissed.

The first question that will be considered is whether there was error in sustaining the ground of demurrer numbered 1.

What in law is a proximate cause is well expressed in the definition found in the case of *Railroad Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. ed. 256: "The primary cause may be the proximate cause of a disaster, though it operates through successive instruments, as an article at the end of a chain may be moved by force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place: *Acott v. Shepherd*, 2 W. Black. 892. The question always is, Was there any unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" This definition is quoted with approval in *Mack v. Railroad*, 52 S. C.

324, 68 Am. St. Rep. 913, 29 S. E. 905, 40 L. R. A. 679. This court then says: "There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new independent intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring the injurious results. Whether the natural connection of ²⁰⁵ events was maintained or was broken by such new independent cause is generally a question for the jury."

The rule is thus stated in *Harrison v. Berkeley*, 1 Strob. 525, 549, 47 Am. Dec. 578: "It is therefore required that the consequences to be answered for should be natural as well as proximate: 7 Bing. 211; 5 Barn. & Adol. 645. By this I understand not that they should be such as upon a calculation of chances would be likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result as that the usual course of nature should seem to have been departed from. In requiring concurring consequences that they should be proximate and natural to constitute legal damage, it seems that in proportion as one quality is strong may the other be dispensed with; that which is immediate cannot be considered unnatural; that which is reasonably to be expected will be regarded, although it may be considerably removed: *Bennett v. Lockwood*, 20 Wend. 223, 32 Am. Dec. 532." This language is quoted with approval in the case of *Pickens v. South Carolina & G. R. Co.*, 54 S. C. 498, 32 S. E. 567.

Indeed, the rule is well settled, but the difficulty arises in its application to the facts of the particular case.

It unquestionably appears from the allegations of the complaint that the injury to the horse was the direct and proximate result of negligence on the part of the defendant. The conduct of the plaintiff, in attempting to rescue his horse from the dangerous position in which it was placed by the alleged wrongful act of the defendant, cannot be said to have been an independent agency in causing injury to the plaintiff if he acted in such a manner as was naturally and reasonably to be expected under the circumstances.

It is contended that he should have gone elsewhere for assistance. In the first place, the danger of loss by the destruction of his property was pressing, and in the second place, it would have savored of cruelty to the animal to ²⁰⁶ have left it with almost a certainty that it would have broken its leg, in endeavoring to extricate its foot from the hole in the bridge. The act of the plaintiff was such as might reasonably and naturally have been expected from a man of ordinary prudence actuated by a commendable desire to relieve an animal from an extremely dangerous position. There was error, therefore, in sustaining this ground of demurrer.

The next assignment of error that will be considered is in sustaining the second ground of demurrer.

After quoting the provision of the statute preventing a recovery by the plaintiff when he "has not in any way brought about such injury or damage by his own act or negligently contributed thereto," Mr. Chief Justice McIver, in the case of *McFail v. Barnwell Co.*, 57 S. C. 294, 302, 35 S. E. 562, uses this language: "The legislature, by the use of the language above quoted, manifestly intended to declare that in either one of two contingencies the plaintiff could not recover: 1. If the injury was in any way brought about by his own act; 2. If he negligently contributed thereto. Now, if the statute had stopped after declaring the first of these contingencies, then possibly the conclusion might have been that the negligence of the plaintiff, in order to bar recovery, must be the efficient cause of the injury, or, to use the language of the circuit judge, must be the immediate proximate cause of the injury as the words 'brought about' seem to imply." This language is quoted with approval in the case of *Duncan v. Greenville Co.*, 73 S. C. 254, 53 S. E. 367.

Our construction as to the first of said contingencies is that, in order to bar a recovery, the act of the person injured must be the efficient cause of the injury, i. e., the immediate and proximate cause thereof.

The allegations of the complaint are sufficient to show that the act of the plaintiff was not the proximate cause of the injury. Therefore, there was error in sustaining this ground of demurrer.

²⁰⁷ It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

The Subsequent Case of Snipes v. Atlantic Coast Line R. R. Co., 76 S. C. 207, 56 S. E. 959, was decided on the authority of the principal case. The facts in the two cases are identical except that in the former the accident happened on a railroad bridge instead of a county bridge. The supreme court in deciding the case announced that where a mule, drawing a buggy along a public highway, catches its foot in a hole in a railway bridge at a crossing, and its owner, in attempting to help the animal extricate its foot, is injured by its falling on him, the negligence of the railroad company in failing to keep its bridge in repair is the proximate cause of the injury, and the company is liable therefor, providing the owner in so doing acted as a reasonably prudent person would do under similar circumstances and did not act in the face of obvious danger.

The Doctrine of Proximate Cause is the subject of a note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861. See, too, the recent cases of *McLane v. Botsford Elevator Co.*, 136 Mich. 664, 112 Am. St. Rep. 384; *Stephenson v. Corder*, 71 Kan. 475, 114 Am. St. Rep. 500. The proximate cause of an injury is that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted: *Chattanooga Light etc. Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844. The proximate cause is the superior or controlling agency as contradistinguished from those causes which are merely incidental or subsidiary to the principal or controlling cause: *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941; *Georgetown Tel. Co. v. McCullough*, 118 Ky. 182, 111 Am. St. Rep. 294.

PLYLER v. MCGEE.

[76 S. C. 450, 57 S. E. 180.]

USURY—Defense Against.—Honest belief by the holder of a note in his legal right to collect compound and usurious interest under the terms of his note, is no defense to the penalty imposed by law against usury. (p. 951.)

B. M. Shuman, for the appellant.

A. C. Welborn, for the appellee.

450 WOODS, J. This action was brought under the usury statute to recover seven hundred and forty-two dollars and seventy-two cents, double the amount of all interest paid on a note of which the following is a copy:

451 “\$700.00 Greenville, S. C., Nov. 25th, 1898.

“On December 1st, 1899, after date, we or either of us, I promise to pay to the order of B. M. McGee, and payable at Greenville, S. C., without offset, the sum of seven hundred

no-100 dollars, for value received. Interest after maturity at the rate of eight per cent. per annum until paid, with ten per cent. attorney's fee. should this note be collected by law. Interest to be paid or computed annually at same rate until paid in full. M. T. PLYLER."

On the trial the defendant admitted that he had computed and collected compound interest instead of annual interest, supposing that to be his right. The circuit judge directed a verdict for the amount claimed.

The questions made in the ingenious argument of appellant's counsel have been settled against his contention. Honest belief by the defendant in his legal right to collect compound interest under the terms of the note cannot avail him: *Carolina Sav. Bank v. Parrott*, 30 S. C. 64, 8 S. E. 199; *Mitchell v. Bailey*, 57 S. C. 34, 35 S. E. 581; *Earle v. Owings*, 72 S. C. 362, 51 S. E. 980. The case of *Rushton v. Woodham*, 68 S. C. 110, 46 S. E. 943, does not apply. In that case it was held "the collection of an excess of interest on account of a mere mistake in computation or other error in fact against the intention of the party will not support the charge of usury." Here there was no mistake of fact made against defendant's intention. He intended to collect compound interest, and it can make no difference that he supposed he had a legal right to exact the excessive charge.

The position that the defendant did not receive any excess interest which he had charged and contracted for, and therefore the transaction did not fall under the last clause of section 1663 of the Civil Code, is equally untenable. To charge means to lay a burden on. This is the meaning applied in *Ehrhardt v. Varn*, 51 S. C. 550, 29 S. E. 225. The defendant charged and collected a greater rate of interest ⁴⁵² than the note called for, and though in this particular case the result may seem hard, it is impossible to relieve him of the penalty imposed by law.

It is the judgment of this court that the judgment of the circuit court be affirmed.

A Contract for Interest at higher than the legal rate, made through mistake and without a corrupt intent on the part of the lender to exact an unlawful rate of interest, has been held not usurious: Anderson v. Creamery Package Mfg. Co., 8 Idaho, 200, 101 Am. St. Rep. 188; Goodale v. Wallace, 19 S. Dak. 405, 117 Am. St. Rep. 962.

SHIRLEY v. ABBEVILLE FURNITURE COMPANY.

[76 S. C. 452, 57 S. E. 178.]

MASTER AND SERVANT—Minor Employé—Assumption of Risks—Negligence of Fellow-servant.—If a servant is injured in consequence of working in an unsafe place and outside the scope of his employment, where he has gone on the order of a mere fellow-servant, not authorized by the master to assign his place of labor, the master is not liable, and this rule applies to a minor employé unless he is of such immature age as not to appreciate the danger to which the fellow-servant's negligence subjects him. Whether he is of such age is clearly a question of fact for the jury. (pp. 954, 955.)

MASTER AND SERVANT—Minor Employés—Assumption of Risks.—The master is held to a stricter account to a servant of tender years than to an adult servant and if the master, or one authorized to assign the place of work, sets a servant of tender years to work on a machine which he has not the capacity to operate by reason of his youth, the master is liable for any resulting injury, but it is a question for the jury to determine whether the child was of sufficient intelligence to be chargeable with the assumption of risk, the presumption being against want of capacity. (p. 955.)

MASTER AND SERVANT—Assumption of Risks—Pleading.—A denial of allegations that a servant did not know the dangerous character of the work in which he was injured, was not warned of it, and did not assume the risk, is sufficient to raise the issue of assumption of risk. (p. 956.)

MASTER AND SERVANT—Assumption of Risks—Instructions.—A request for an instruction "that a servant has the right to assume without inquiry or examination that the appliances furnished him are safe and suitable," calls for a statement of the law as to the assumption of risks of known defects and dangers, and the person asking such instruction cannot complain because a charge on the assumption of risk is given. (p. 956.)

W. N. Graydon, for the appellant.

W. P. Green and F. B. Gary, for the appellee.

454 WOODS, J. John F. Shirley, a boy of fifteen years, employed by the defendants in their furniture factory, was killed while trying to put a belt on a pulley. The plaintiff, his mother, as administratrix of his estate, brought this action to recover damages for his death. The verdict was for the defendants, and the plaintiff appeals, alleging errors in the charge of the circuit judge.

The contract of employment under which deceased worked was made by his father, and there was no dispute that under it his position was that of a "tail-boy," imposing upon him the sole duty of bearing off lumber after it had been sawed and dressed. The evidence on both sides shows that deceased was sent by one White, who also worked in the factory, to put

either on or off of the pulley a belt which was "burning," and that such a task was beyond the capacity of the boy and extremely dangerous to him.

On behalf of the plaintiff, Charlie Shirley, a younger brother, testified that he went with the deceased to adjust the belt; that they succeeded in getting the belt off the pulley, thus relieving the "burning"; that he warned John of the danger of attempting to put the belt on another pulley, and that John insisted in making the effort, saying: "Egbert White told me to put it on, and I am going to try it."

The serious question of fact made by the evidence was, whether White had any authority from the defendants to direct the deceased in his work. Plaintiff offered testimony to the effect that White was a foreman, and the deceased and his brother Charlie worked under his orders. * On the contrary, according to the testimony of the defendants, White was not a foreman, but a mere fellow-servant of the deceased, not authorized by the defendants to control his services in any respect. As to this issue, in his main charge and in responding to numerous requests to charge, the circuit judge instructed the jury in substance as follows: As one of the non-delegable duties of the master is to furnish a safe place to work, the master would be liable for any injury resulting to the servant from working in an ⁴⁵⁵ unsafe place at the direction of anyone authorized by the master, either directly or indirectly, to assign the servant to a place of labor. Conversely, if the servant was injured in consequence of working in an unsafe place, where he had gone on the order of a mere fellow-servant not authorized by the master to assign his place of labor, the master would not be liable because, with respect to the master, the fellow-servant undertaking to give the order would be a mere volunteer. This statement of the law is in accord with the principles laid down in *Gunter v. Graniteville Co.*, 18 S. C. 270; *Calvo v. Railroad Co.*, 23 S. C. 526; *Jenkins v. Richmond & D. R. Co.*, 39 S. C. 507, 39 Am. St. Rep. 750, 18 S. E. 182; *Wilson v. Charleston & S. R. R. Co.*, 51 S. C. 79, 28 S. E. 91; *Brabham v. Telephone Co.*, 71 S. C. 53, 50 S. E. 716; *Martin v. Royster Guano Co.*, 72 S. C. 237, 51 S. E. 680. The cases of *Calvo v. Railroad Co.*, 23 S. C. 526, and *Brabham v. Cotton Mills*, 61 S. C. 491, 39 S. E. 708, are particularly applicable.

It is contended, however, as we understand appellant's argument, that the fellow-servant doctrine has no application

to infants of the age of the deceased, and that accordingly the master is liable when such an infant is injured in consequence of the negligence of a fellow-servant. Cases have been cited by counsel for appellant in which the master has been held liable for injuries to an infant received in work outside of the scope of his employment, undertaken at the direction of a foreman whose orders he had been instructed to obey, but, as said in Labatt on Master and Servant, section 465: "In most of the cases the servant giving the order was one who, under the recognized exceptions to the doctrine of common employment, was vice-principal, either because he was a general representative of the master as respects the management of the whole business, or a particular department thereof, or because he was a superior servant in a state where such superiority constitutes vice-principalship at common law. In some cases the directing employé was one for whose negligence the master had been declared liable by a statute in force in the jurisdiction where the injury was received. But there are also some decisions which, when ⁴⁵⁶ collated with others rendered by the same court, would seem to indicate that a master would be bound by an order given by an employé who is not a vice-principal. Whether such a doctrine, if it is really embodied in the cases cited, can be justified on strictly logical grounds, is very doubtful. A mere coservant who takes upon himself to give an unauthorized order is clearly guilty of negligence, and there is no apparent reason why this fact should not be deemed to let in the defense of common employment." In this case, as required by the law of this state, the circuit judge charged the master would be liable if the servant giving the order to undertake new and dangerous work was acting under the authority of the master in assigning the place or character of the work.

The further instruction was given that it was the duty of the master to warn the servant of unknown dangers; and that the master would be liable for any injury resulting to a servant from a dangerous machine which he had been assigned to operate by the authority of the master without warning.

Whether an infant is of capacity to so appreciate danger as to be chargeable in any degree with the assumption of risk is ordinarily a question of fact for the jury. Conceivably, an infant might be employed so young that the

court would say, as a matter of law, that no other inference could be drawn than that he was not chargeable with the assumption of risks; but manifestly the evidence here does not present a case so extreme. On the part of the plaintiff, it was proved that even the younger brother of the deceased had some appreciation of the danger and warned him against it. The negligence of fellow-servants, selected with reasonable care, is one of the risks assumed by employes. So, if White was a fellow-servant and not the representative of the master, then his negligence was one of the risks assumed by the deceased, unless he was of such immature age as not to appreciate and assume the danger to which White's negligence might subject him. Whether he was of such age was ⁴⁵⁷ clearly a question of fact for the jury. The plaintiff has no ground to complain of the charge on this point.

The sixth request to charge was as follows: "That in case of a child of tender years the master is held to a stricter account than in the case of an adult, and if the jury find that the foreman of the defendant sent the said John F. Shirley to do a dangerous piece of work and beyond his capacity to perform and should further find from the testimony that the said child, while attempting to perform said work with the only appliances which were furnished him, was killed, then the jury must find for the plaintiff." This request could only rest upon the assumption that there was a foreman of the defendant authorized to assign the deceased to operate certain machinery, or on the assumption that the deceased had no appreciation of the danger to which he was subjected by reason of association with his fellow-servants, and, therefore, could not be held to assume the risk of their negligence. These matters could not be assumed by the judge, but were to be settled by the jury.

The circuit judge did charge, however, that the master is held to a stricter account to a servant of tender years than to an adult servant; that if the master, or one authorized by him to assign the place of work, sets a servant of tender years to work on a machine which he had not the capacity to operate by reason of his youth, the master would be responsible for any resulting injury; that it is a question for the jury to determine whether the child was of sufficient intelligence to be chargeable with the assumption of risks, and that the presumption is against such capacity as to make him so chargeable. This was all said in response to requests

concerning the duty of the master to furnish safe mechanical appliances and the right of the servant to assume that he had done so. If a specific instruction to the same effect had been desired as to the duty of the master to use reasonable diligence to obtain safe human appliances—careful and competent servants—the right of the servant to assume that he⁴⁵⁸ had done so, and as to a presumption against a boy of tender years assuming or appreciating the risks of an incompetent or negligent foreman, or other fellow-servant, a request to that effect should have been presented.

The exception alleging error, because the circuit judge charged on the law of assumption of risk, when the answer did not set up that defense, cannot be sustained for two reasons. In the first place, the complaint alleged in substance, deceased did not know of the dangerous character of the work in which he was injured, was not warned of it, and did not assume the risk. The denial of this allegation was sufficient to raise the issue of assumption of risk: *Long v. Southern Railway Co.*, 50 S. C. 49, 27 S. E. 531; *Hutchins v. Manufacturing Co.*, 68 S. C. 514, 47 S. E. 710. In the second place, the request of the plaintiff to which we have adverted, "that a servant has the right to assume, without inquiry or without examination, that the appliances furnished him are safe and suitable," called for a statement of the law as to the assumption of risks of known defects and dangers.

It is the judgment of this court that the judgment of the circuit court be affirmed.

The Doctrine of Assumption of Risks in the law of master and servant, together with the contributory negligence of an employé as barring his right to recover for injuries, is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289. The rule in respect to the assumption of risks by employés is modified in the case of young persons of inexperience and immature judgment: *Siegel-Cooper & Co. v. Trcka*, 218 Ill. 559, 109 Am. St. Rep. 302; *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, post, p. 957.

If a Servant Proceeds Under the Orders of His Master or Superior in performing an act whereby he is exposed to unusual danger, the master is liable for the resulting injury to the servant, unless the risk is fully realized by the servant, or is so apparent that no man of ordinary prudence situated as he is would undertake it: *Long v. Illinois Cent. R. R. Co.*, 113 Ky. 806, 101 Am. St. Rep. 374.

TUCKER v. BUFFALO COTTON MILLS.

[76 S. C. 539, 57 S. E. 626.]

JURORS—Disqualification — Discretion of Court.—The trial court has a very large discretion to excuse a juror on the ground of legal disqualification, if the circumstances are such as, in his judgment, afford any reasonable ground for apprehension of unfairness, and his ruling in this regard will not be reversed except for an abuse of discretion. (p. 959.)

JURORS—Qualifications.—The trial court need not examine the jurors on their voir dire when no motion is made therefor, and the objection raised rests on admitted facts. (p. 959.)

DAMAGES for Injury to Minor—Physician's Fee.—A father suing merely as guardian ad litem for injury to his infant child cannot recover for medical service rendered such child in consequence of his injury. (p. 959.)

TRIAL—Examination of Witness.—How often counsel may be permitted to repeat the same question to a witness to which answer has been made must be left to the discretion of the trial court. (p. 959.)

INFANCY—Capacity to Commit Negligence.—A child about eight years old is prima facie presumed to be incapable of committing contributory negligence. (p. 960.)

INFANCY—Capacity to Commit Trespass.—A child about eight years old is prima facie presumed to be incapable of committing trespass. (p. 963.)

TRIAL—Instructions—Charge on Facts.—If a request to charge the jury that if it finds that plaintiff was not authorized by defendant to go to and put his hand near the machinery, he was a trespasser, is modified by the court by adding that, "in this particular case plaintiff was a person of tender years," and submitting his capacity to commit trespass to the jury, the whole charge is not upon the facts, nor is the issue as to trespass taken from the jury. (p. 963.)

MASTER AND SERVANT—Minor Employé—Fellow-servants. A section boss whose duty it is to keep rollers oiled, and whom employes under him must obey, is not a fellow-servant of an infant who comes in contact with dangerous machinery under the order of such section boss in connection with the oiling of such rollers. (p. 965.)

MASTER AND SERVANT—Minor Employé—Safe Place to Work.—If a minor visitor, in a mill by permission, is called upon by a section boss to aid him in the performance of a duty which he, representing the master, owes to an employé, the visitor becomes an employé as to that particular work, and it becomes the duty of the master to furnish him a safe place to work. (p. 965.)

J. A. Sawyer, for the appellant.

DePass & DePass, for the appellee.

540 JONES, J. The plaintiff, a minor eight years old, brought this action to recover damages for personal injuries alleged to have been sustained by him while in the employ

of the defendant as spinner in its cotton-mill, and recovered a judgment for one thousand dollars, from which defendant appeals.

The complaint alleges that plaintiff was ordered by a representative of defendant to go to the oil cup and saturate ⁵⁴¹ waste cloth with oil and oil his rollers, and that said oil cup was dangerously close to the rapidly revolving gearing, and that such undertaking was attended with serious hazard; that defendant's representative knew of the great danger of said undertaking and of plaintiff's tender years, and failed to caution him of said danger. That while engaged in saturating the waste, as directed, the gearing, which it is alleged was exposed and in rapid motion, caught the waste and with great force and violence jerked plaintiff's hand in said gearing and so crushed it as to render necessary the amputation of the index finger of the right hand. The plaintiff's damage was for two thousand dollars, and was due to defendant's negligence: (a) In ordering plaintiff out of the line of his employment to get the oil from the cups without informing him of said machinery being exposed, he being a child of tender years, and of the danger attendant upon his mission, of which he was ignorant; (b) in leaving said gearing in such exposed condition and in not providing this employé with safe machinery and with a safe place to work; (c) in not informing and instructing plaintiff, he being of tender years, of the danger incident to said mission, and of the caution to be exercised by him in consequence of such exposed running machinery of which he was ignorant.

The answer, after a general denial, alleged as a special defense that any injury sustained by plaintiff was caused by the act of plaintiff himself, as the sole cause thereof, in that, while in defendant's mill and about and near defendant's machinery, without any right or authority whatever, and while playing and intermeddling with defendant's machinery, and without authority, had his finger caught in the gearing; also contributory negligence.

The first exception alleges error in the ruling of the circuit court that any juror connected with either the Union or Buffalo Cotton Mills was incompetent to try the case. When the case was called on circuit, plaintiff requested that all jurors be asked whether or not they were employés or stockholders in either the Union or. ⁵⁴² Buffalo Cotton Mills. The defendant objected solely on the ground that the two mills

were distinct corporations having one president. It was ascertained that the three jurors were employed by the cotton-mills named and two by the Union Mills store. While we do not regard this fact as ground for legal disqualification of a juror, still the circuit court has very large powers as to the conduct of jury trials, including a discretion to excuse a juror for this cause, if the circumstances are such as, in the judgment of the court, would afford any reasonable ground for apprehension of unfairness, and his ruling will not be reversed except for abuse of discretion, which does not appear in this case: *State v. Wyse*, 32 S. C. 45, 10 S. E. 612. Appellant contends that the circuit court should have examined the jurors on their voir dire, and cites *State v. Williams*, 31 S. C. 238, 9 S. E. 853, but no request for such examination was made, and the ground of objection stated shows that there was no issue as to facts, but presented merely a legal question as to whether the jurors were disqualified on an admitted state of facts.

The second exception questions the ruling of the circuit court in admitting testimony as to the amount paid by the father of plaintiff to a physician for medical service rendered the plaintiff in consequence of his injury. The testimony was admitted over objection, the court ruling that this was an element of damages. This was clearly error, as this action is in behalf of the infant alone, and the father suing merely as guardian ad litem for injuries to his infant child cannot recover for expenses incurred for which the father himself is personally liable: 8 Ency. of Law, 647; *Newbury v. Getchel & Martin etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 581, 69 N. W. 743. This error is sufficient to work a new trial unless the plaintiff remits two dollars of the judgment on the record, since in no view of the testimony admitted could the amount paid for medical services exceed that sum.

543 With reference to the ruling complained of in the third exception we find no error. The witness had stated in reply to a question that he had no recollection of it, and on the question being repeated the court said: "He has answered the question, but if he recollected the matter he could answer." How far counsel may be permitted to repeat the same question to which answer had been made must be left to the discretion of the trial court.

The circuit court instructed the jury substantially that a child under seven years of age is conclusively presumed to

be incapable of committing contributory negligence, that between the ages of seven and fourteen years there is a prima facie presumption of such incapacity, but that this could be overcome by evidence showing that the child was capable of exercising care to avoid danger. Appellant objects to this charge on the ground that it was incorrect and imposed a greater burden on defendant than the law requires. The fourth and fifth exceptions raising this question cannot be sustained.

We are not concerned in this appeal as to whether the circuit court committed error in so far as it charged that there was a conclusive presumption of incapacity of a child under seven years of age to commit contributory negligence. There is no dispute that the plaintiff was about eight years old; hence we are not to be regarded as making any ruling on that particular point.

The real point involved is the correctness of the charge as applied to a child eight years old. Appellant contends that the question of the capacity of plaintiff to commit contributory negligence should have been submitted to the jury unhampered by the charge as to the prima facie presumption as to incapacity, and that the charge was in conflict with the rule stated in *Bridger v. Railroad Co.*, 25 S. C. 24, and *Bridger v. Railroad Co.*, 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860. In the first-mentioned case, the plaintiff was a boy ten years and ten months old when he sustained the injuries complained of, and the question of his capacity was held to have ⁵⁴⁴ been properly submitted to the jury. In the last-mentioned case, the plaintiff was the father of the boy alleged to have been injured suing in his own behalf. The circuit court in that case charged the jury generally "that the test of the boy's capacity for contributory negligence was his age, his intelligence, his ability to know his surroundings, and the danger of what he was doing with the turntable, and if the jury found as a matter of fact that the boy had sufficient intelligence, etc., to know and understand these things, all of which was for them, that then he would assume to charge that such one was subject to the rules of ordinary care and intelligence, and failing to exercise the same would defeat the right of plaintiff to recover here if he contributed to his injury." Responding to exceptions to this charge, the court said: "The injured boy does not seem to have been so young as to have required the judge to say that he

could not contribute to his injury. Nor was he of that age where the presumption would necessarily arise, in the absence of testimony to the contrary, that he could. Under these circumstances his honor left the question very properly to the jury, resting it upon the intelligence and capacity of the boy, as was done in the former case of Edgar Bridger against this defendant." There is nothing in this language which suggests that it was error to instruct the jury, with respect to an infant ten years and ten months old, that the law raises a *prima facie* presumption of incapacity to be overcome by evidence showing capacity.

The case of *Morrow v. Gaffney Mfg. Co.*, 70 S. C. 242, 49 S. E. 573, also cited by appellant, merely decides that it was for the jury, and not the court, to say whether the plaintiff, a boy between fourteen and fifteen years of age, had sufficient intelligence and capacity to render him guilty of contributory negligence. There was no request to charge and no charge or exception raising any question as to presumption of capacity in a child fourteen years old.

In the case of *Watson v. Southern Ry. Co.*, 66 S. C. 47, 44 S. E. 375, this court was considering whether the ⁵⁴⁵ negligence of a parent or custodian could be imputed to a child seven or eight years of age, so as to defeat a recovery by his administrator suing under Lord Campbell's Act. The court held that such negligence could not be imputed to the infant and in its reasoning said: "In this case the deceased was seven or eight years old, and there was no evidence whatever submitted as to his knowledge, intelligence or capacity for observing care. In the absence of any such evidence the *prima facie* presumption is that he was incapable of personal negligence." This language may not have been absolutely essential to the decision of the question involved in that case, but still it was pertinent as a reason for the decision because the main ground against the imputation of negligence of a custodian or parent to an infant child rests on the incapacity of the infant *non sui juris* to subject its personal rights to the control of another.

But regarding the point as not concluded by any of the cases cited above, we think the charge of the circuit court may be sustained. The charge was based upon the well-known rule in reference to the capacity of infants to commit crime, a rule founded in deep knowledge and experience with reference to the power of infants to discern between right

and wrong, and has the support of a number of cases in other jurisdictions, of which we cite: *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 193, 25 Am. Rep. 310; *Taylor v. Delaware & Hudson Canal Co.*, 113 Pa. 162, 57 Am. Rep. 446; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 South. 555; note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590; *Rhodes v. Georgia R. R. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922; *Lorence v. Ellensbury*, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34. In further analogy to this rule, in Pennsylvania it was held that, in the absence of proof to the contrary, an infant of the age of fourteen years will be presumed to have sufficient capacity to recognize and avoid danger, and a similar rule was announced in New York as to an infant twelve years old because of a penal ⁵⁴⁶ statute fixing twelve years as the age when presumption of incapacity ceases: *Nagle v. Railroad Co.*, 88 Pa. 35, 32 Am. Rep. 41; *Tucker v. New York etc. R. R. Co.*, 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916. We see no good reason why the rule stated by the circuit court should not be applicable and found practically useful in suits involving contributory negligence.

It must be remembered that contributory negligence is an affirmative defense, and the defendant must show that the plaintiff failed to observe the care due under the circumstances. In showing whether there was a failure to observe due care, or ordinary care under the circumstances, on the part of the plaintiff, the defendant must necessarily show that the situation of plaintiff was such as to call for the exercise of due care. If it appears that plaintiff was an adult, the prima facie presumption would be that he had capacity to exercise due care, and the burden would be on the plaintiff to show want of capacity; if, on the contrary, it appears that plaintiff was an infant of tender years, then the burden is on the defendant to show capacity to observe due care. Hence, from the very nature of the affirmative defense of contributory negligence, it was not error to require that defendant should assume the burden of proof not only to show facts which would constitute contributory negligence in an adult or one sui juris, but that the party charged with contributory negligence, if an infant, had age and intelligence to observe the requisite care.

The circuit court made a similar charge as to presumption of incapacity of an infant to commit a trespass in response to the allegations in defendant's answer that plaintiff was intermeddling with its machinery, and the fifth exception charges error in this regard; but for reasons given in considering the fourth exception, this exception cannot be sustained. It is true an infant may be a trespasser in a technical sense when it goes where it has no rightful permission or authority to be, but the same rules do not apply to infant as to adult trespassers: *Mason v. Railway Co.*, 58 S. C. 80, 36 S. E. 440. An infant non sui juris cannot be ⁵⁴⁷ such a trespasser as would exempt anyone from the duty of exercising ordinary care to avoid doing it an injury. Whether the infant is sui juris is a question for the jury, when the evidence as to age, intelligence and capacity leaves the question in doubt, or leaves room for more than one inference, but when the evidence is susceptible of but one inference, it is a question of law for the court. In this case the only evidence offered on the subject was that the plaintiff was "not quite eight years old" when injured. It is true he testified as a witness in the case, but the injury was May 3, 1904, and the trial was at September term, 1905, something over sixteen months after the injury. Under these circumstances the defendant has no just ground to complain that the question of capacity was submitted to the jury with an instruction that with respect to a child of that age there is a prima facie presumption of incapacity. Furthermore, there was no evidence that plaintiff was a trespasser, the evidence being undisputed that plaintiff was present in the mill with knowledge and acquiescence of defendant, at least as the companion and assistant of her sister, an operative, and that plaintiff was instructed by the section boss to do the thing which brought him in contact with the unguarded machinery.

The defendant requested the court to charge as follows: "That if you find that the plaintiff, Boyd Tucker, was not an employé of the defendant in its mill, but that he was at or about the machinery of the defendant without authority to be there, even though he was in the mill by permission; still if you find that he was not authorized by the defendant to go to the running machinery and place his hand on the same, then if you find that to be the fact, he (Boyd Tucker) was a trespasser in going to the running machinery and placing

his hand on the same, and if that be the fact, then the only duty the defendant owed him was not to wantonly or willfully injure him." In response to this request the court gave the charge to the jury with this modification: "That is a sound proposition of law, but it is to be ⁵⁴⁸ taken in connection with this case. In this particular case, the plaintiff was a person of tender years, and you will have to take into consideration whether or not he was a trespasser. If you conclude that he was not a trespasser, then, as a matter of course, this principle would not apply."

The defendant excepts to the modification on the grounds: 1. That this was a charge on the facts; 2. That it took from the jury the question whether the plaintiff was a trespasser. As the evidence was undisputed that the plaintiff in this case was a child eight years old, it is obvious that such a child is one of tender years, and in so characterizing the plaintiff the court was not charging upon the facts, or in any way intimating to the jury his opinion on the question submitted to the jury as to the capacity of the child; nor did the court thereby take from the jury the question whether the plaintiff was a trespasser, for the court in the charge repeatedly submitted this issue to the jury. To have charged as requested by defendant would have been error in assuming the very question in issue, whether plaintiff was a trespasser, or had capacity to be a trespasser in such sense as to make the defendant liable only for willful injury.

The seventh and eighth exceptions do not require special notice, as they are controlled by the principles stated in considering the fourth, fifth and sixth exceptions.

The ninth, tenth and eleventh exceptions complain of error in refusing the motion for a new trial, (1) because there was no evidence to sustain the verdict, (2) because the verdict is excessive, (3) because the plaintiff when injured was undertaking to perform duties outside the scope of his employment and if he acted under the order of the section boss (Grover Hart), as alleged, said Hart had no authority to make such order.

The court has frequently declared that it has no authority to correct a verdict on the ground that it was excessive.

After careful consideration, we cannot say that there was no evidence to support the verdict.

⁵⁴⁹ The theory of the plaintiff was that he was an employé of defendant, and that he sustained his injuries because of

defective machinery with which he came in contact under the order of a superior officer representing the defendant. The theory of the defendant is that plaintiff was not an employé, but was present in the mill as companion and assistant to his sister, one of the operatives, and that if any such order as alleged was given by the section boss, it was without authority.

There was testimony that Grover Hart was section boss, and that it was the duty of those under him to obey his orders, and that it was his duty to keep the rollers oiled, that when the rollers needed oiling they were carried to the section boss for that purpose. The plaintiff testified, without contradiction, that when he carried the roller to Grover Hart, the section boss, he instructed plaintiff, without warning him as to the danger, to get some waste cotton and stick it in that little crack, and get some oil, which was in the oil pan under the gearing, and oil his roller, and that while so engaged the gearing, which was unguarded, caught his finger and pulled it in.

In the case of *Brabham v. Telephone & Telegraph Co.*, 71 S. C. 53, 50 S. E. 716, the court declared: "In determining who are fellow-servants, the test or rule in this state is not whether the servants are of different grade, rank or authority, one of them having power to control and direct the services of another, but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master intrusted to the injured servant." Tested by this rule, the section boss was not a fellow-servant with the plaintiff, if the plaintiff be considered an employé, but was the representative of the master, since the order was given in the performance of the duty of the master to keep the machinery in reasonably safe and suitable condition. If, therefore, the plaintiff came in contact with dangerous machinery ⁵⁵⁰ under the order of the section boss, under these circumstances it cannot be said that the order was given without authority.

If it be conceded that plaintiff was in the mill as a mere companion and assistant of his sister, and in this situation was called upon by the section boss to aid him in the performance of a duty which he, representing the master, owed to the employés, this would make plaintiff an employé as to that particular work, and then it would be the duty of defendant to furnish plaintiff a safe place to work, under the

principle stated in *Jackson v. Southern Ry. Co.*, 73 S. C. 557, 54 S. E. 231, that where a station agent of a railroad company calls in a bystander to assist in pushing cars from a fire, he discharges the duties of a superior agent or officer of the company, and must provide a safe place for the bystander to work.

All the exceptions except the second are overruled. Under the second exception the judgment is erroneous to the extent of two dollars.

The judgment of this court is that the judgment of the circuit court be reversed and a new trial granted unless the plaintiff remits from the judgment the sum of two dollars within thirty days from the filing of the remittitur, and that upon this being done, the judgment of the circuit court is affirmed.

A Master is Liable for Negligence in the performance of a personal duty due to his servants, delegated by him to another as vice-principal, whether such other is a foreman or coservant, or whatever his position may be: *Baier v. Selke*, 211 Ill. 512, 103 Am. St. Rep. 208; *Sullivan v. Wood*, 43 Wash. 259, 117 Am. St. Rep. 1047. As to who are vice-principals, see the note to *Mast v. Kern*, 75 Am. St. Rep. 584.

The Doctrine of Assumption of Risks and Contributory Negligence on the part of employes as affecting their right to recover for injuries sustained while engaged in the service is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289; *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 586. The law on this question is modified in the case of youthful and inexperienced employes: *Siegel-Cooper & Co. v. Trecka*, 218 Ill. 559, 109 Am. St. Rep. 302; *Shirley v. Abbeville Furniture Co.*, 76 S. C. 452, ante, p. 952.

Negligence in Dealing with Children is the subject of a note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 406.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

GENERAL OIL COMPANY v. CRAIN.

[117 Tenn. 82, 95 S. W. 824.]

SUITS AGAINST STATE.—A Constitutional Provision that suits may be brought against the state in such manner and in such courts as the legislature may by law direct is not self-executing. (p. 971.)

SUITS AGAINST STATE.—The Funds or Property, actual or prima facie, of the state of Tennessee, cannot be made the subject of litigation directly by making it a party, nor indirectly by suing one of its officers, save where it has given its consent by express legislation. (p. 972.)

SUIT AGAINST STATE OIL INSPECTOR.—Interstate Commerce.—A suit to restrain a state oil inspector from inspecting oils is in effect a suit against the state, and hence subject to demurrer, although it alleges that the oils in controversy are a part of interstate commerce, and that the inspection statute, as applied to them, is unconstitutional. (p. 973.)

Turley & Turley, and H. J. Livingston, Jr., for the complainant.

Attorney General Cates and Thomas H. Jackson, for the defendant.

⁸³ BEARD, C. J. The complainant is a corporation chartered under the laws of Tennessee, with its situs in Memphis, in this state, and the defendant Crain is a resident of Shelby county and the duly appointed, qualified and acting inspector of coal oil and other illuminating fluids for that county, under and by virtue of chapter 349, page 811, of the Session Acts of 1899 of the legislature of Tennessee.

The bill alleges that complainant is the owner of ⁸⁴ oil wells and refining plants in the states of Pennsylvania and Ohio, and for several years prior to the institution of this

suit had been engaged in the manufacture, shipment, and sale of coal oil and other illuminants, and in carrying on this business it used Memphis not only as a place for the sale of its oils to the citizens thereof, but also as one of its distributing points, to which it shipped the product of its wells and plants in railroad tank-cars, from which the oil was unloaded and then placed in various vessels for shipment to complainants' customers in Arkansas, Louisiana and Mississippi.

The bill further alleges that complainant has, at its place of business in Memphis, numerous tanks of oil, among which are two described as follows:

"1. A tank or vessel in which complainant constantly keeps and will keep, and in which there now is, only oil for which orders have been received from customers of complainant in Arkansas, Louisiana, and Mississippi, before said oil was shipped from complainant's plants in Pennsylvania and Ohio, and which was shipped especially to fill said orders. This oil is unloaded in Memphis from the railroad tank cars solely for the purpose of distribution into smaller vessels, or receptacles, to meet the requirements of said orders, and said oil is, and has always been, kept wholly separate and distinct from other oils and fluids of complainant in the State of Tennessee, in a tank plainly and conspicuously marked, 'Oil Already Sold in Arkansas, Louisiana, and Mississippi,' and, of course, complainant has sold, and ⁸⁵ will sell, none of this oil in the state of Tennessee, since the same has already been sold to customers in Arkansas, Louisiana and Mississippi; in fact, this oil has remained, and will remain, in Shelby county, in the state of Tennessee, only long enough to be properly distributed, and reshipped, according to the orders therefor, whereupon it will proceed at once upon its journey to the various places in the states of Arkansas, Louisiana and Mississippi, from which said orders were received. This will be only a few days.

"2. In another tank or vessel, at its place of business in Memphis, complainant has now and constantly keeps, and will keep, only oil shipped from Pennsylvania and Ohio for sale in the states of Arkansas, Louisiana and Mississippi, but for which complainant has no orders on hand from said states at the time of such shipments. This oil, as soon as it reaches Memphis in the railroad tank-car, is placed in said tank or vessel, which is plainly and conspicuously marked, 'Oil to be Sold in Arkansas, Louisiana and Mississippi,' and is there kept wholly separate and apart from all other oil, until re-

quired to supply orders received from complainant's Arkansas, Louisiana and Mississippi customers; and complainant never sells or offers for sale any oil from this tank except upon orders from Arkansas, Louisiana and Mississippi, upon receipt of which complainant ships said oil to the persons sending said orders."

With regard to these tanks, which are thus designated Nos. 1 and 2, it is alleged that, at the time of the filing ⁸⁶ of the bill, as well as for a period of time previous thereto, they contained "and will hereafter contain only oil as above described, unmixed with oil held for any other purpose, and that complainant has never placed in either of said tanks any oil other than as above described, nor has complainant ever sold, or offered to sell, oil from these tanks except in the manner and to the persons above mentioned."

It is further alleged that the defendant Crain in his official capacity is engaged in the inspection of oil and other illuminating fluids of complainant's in Memphis, receiving for such inspection a fee of twenty-five cents per barrel, as provided by section 8, page 814, chapter 349, of the acts of 1899, already referred to, and that he was then claiming the right under the provision of that act to inspect the oil in tanks Nos. 1 and 2, and was in the act of exercising this right, although it had been separated in the manner alleged.

The complainant then charged "that none of the oil now in, or to be placed therein hereafter, is subject to inspection under the Tennessee law, and that the defendant Crain has no right or power to inspect any of said oil or collect fees for such inspection for the following reasons: '1. Because none of said oil is covered by the language or intention of the act referred to, which is the present coal oil inspection law of Tennessee; 2. If, however, said act, when properly construed, provides for the inspection of the oil in either of said tanks,' " then it is alleged that, in so far as it has that ⁸⁷ effect, it is unconstitutional and void, because a regulation of interstate commerce in violation of section 8 of article 1 of the constitution of the United States.

It is also further charged that if the act of 1899 be held to apply to any of the oil in these two tanks, then it cannot be sustained as a valid exercise of the police power: 1. Because an inspection of these oils was unnecessary to protect either the residents of Tennessee or the reputation of the manufactured products of this state; 2. The inspection fee

provided by the act was unreasonable in that it was much greater than was necessary to provide for the expense of inspection; 3. That as an inspection of these oils would in no way conduce to the health, happiness, morals or safety of the citizens of the state, the inspection fee so imposed was a mere tax under the guise of a police regulation, and as such was in conflict with article 2, section 28 of the constitution of Tennessee, which requires uniformity of taxes throughout the state.

The bill alleged, as an excuse for coming into the chancery court, asking for a decree adjudging its status as to the oil in these two tanks, and invoking its protection in the form of injunctive relief, the peril complainant would incur, under the act of 1899, in obstructing the coal oil inspector in the discharge of his duty, and in selling the oil in these tanks, whether the inspection fees, if paid under protest, could be recovered by the complainant, or if this could be done, it was alleged this would only be bringing, within thirty days after ^{ss} each payment, a suit for recovery thereof, thus necessitating an indefinite number of suits.

The bill was demurred to, among others, upon the ground that this was a suit in fact, though not in name, against the state, and therefore could not be maintained. The chancellor overruled this ground of demurrer, no doubt resting his decree on this point on the authority now relied on to support his action, of *Fry v. Britton*, 2 Heisk. 606; *Lynn v. Polk*, 8 Lea. 121.

The first of these was decided in 1870. From the opinion in the case it appears that a judgment had been taken in a summary proceeding against Fry, a delinquent tax collector, and a portion of his sureties; thereafter a bill was filed by the sureties against the district attorney general and the sheriff to enjoin them from collecting this judgment, and a decree was passed granting this relief.

During the December term, 1870, of this court, the attorney general of the state presented the record for writ of error. His application, however, was declined, the court holding, among other things, that, as the state was not a party to the suit in name, it was not entitled to assign errors.

Another branch of this case, under the style of *Johnson v. Hacker*, reached this court in 1872, though only decided in 1874, and an opinion published in 8 Heisk. 388, as the result of which, without being a party to the suit, the state's claim

against a defaulting revenue collector and his sureties was finally adjudicated against it.

⁸⁹ It is said to be a part of the legislative history of the state that this litigation produced chapter 13, page 15, of the acts of 1873, which is section 4507 of Shannon's Code, and provides as follows: "That no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the state, or any officer acting by the authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits now pending, or hereafter brought, shall be dismissed as to the state, or such officer on motion, plea or demurrer of the law officer of the state, or counsel employed by the state."

It is axiomatic that the state, as a sovereign, is not subject to suit save by its own consent. The constitution of 1870 provides, as did the two earlier constitutions of Tennessee, that "suits may be brought against the state in such manner and in such courts as the legislature may by law direct." This provision, however, is not self-executing: *Williams v. Register, Cooke*, 218; *State v. Sneed*, 9 Baxt. 475.

Under the constitution of 1796, and when there was no statute giving authority to bring suit against the state, a petition for mandamus was filed in the circuit court to compel the register of West Tennessee to issue a warrant entitling the holder thereto, but the court declined the writ upon the ground that, in effect, the proceeding was against the state, and in the absence of a statute providing for suits against the state, the courts were without jurisdiction: *Williams v. Register, Cooke*, 218.

⁹⁰ Although the legislature, at that time, had seen proper not to put this clause of the constitution into effect, yet its silence was regarded as being as complete an answer to the demand of the petitioner as if it had positively forbidden all interference with the state's officers or affairs. The act of 1873 in unmistakable terms has announced as the policy of the state that "no court shall hereafter have . . . jurisdiction . . . to entertain any suit against the state, or any officer of the state acting by authority of the state, with a view to reach . . . its treasury, funds or property." If, without a statutory bar of this sort in *Williams v. Register, Cooke*, 218, the court declined to interfere with the property of the state when its officer was sued, how much more shall it hesitate in the face of this statute when its claim to this inspec-

tion fee is assailed in the person of the representative whose duty it is to collect the same if due? For if the act in question is constitutional, then this is an effort to reach that which is, or is claimed by the state to be, its funds or property. If *Fry v. Britton*, 2 Heisk. 606, is authority for the present contention, then we think it will be difficult to assign any reason for the act of 1873, or to name any good it has accomplished.

We are satisfied, however, that this statute is ample in its operation to do what the legislature intended in its passage, and that now the funds or property, actual or prima facie, of the state cannot be made the subject of litigation in its courts either by making it a party ⁹¹ directly or indirectly by suing one of its officers, save where it has given its consent by express legislation.

In *State ex rel. Bloomstein v. Sneed*, 9 Baxt. 472, decided in 1876, an effort was made to secure a peremptory mandamus requiring a tax collector to receive from the relator notes of the Bank of Tennessee in payment of taxes for the year 1872, but it was held that the act of 1873 was a bar to the jurisdiction of the court.

It is true that in *Burch v. Baxter*, 12 Heisk. 601, *Union & American Pub. Co. v. Burch*, 12 Heisk. 607, *State ex rel. Uhl v. Gaines*, 4 Lea, 352, and other like cases decided since this act, the process of mandamus has been awarded against the comptroller to compel him to issue warrants to parties having claims against the state allowed by law. In these cases, the statute was not adverted to, and evidently for the reason that the proceedings were not regarded as within its scope. While in all of them the effort was to reach funds of the state, yet it in some legislative form had recognized the claims in question and expressly or by implication imposed the duty upon the comptroller of issuing warrants in satisfaction of them to the respective claimants. In other words, the officer of the state had nothing but a ministerial duty to perform. As is well said by McFarland, J., in *Lynn v. Polk*, 8 Lea, 121, the act of 1873 "would certainly not be construed to deprive the court of jurisdiction to compel a ministerial officer to perform a plain ministerial duty; and when the demand of the relator is allowed by law, it ⁹² is the plain ministerial duty of the comptroller to issue his warrant."

This being so, we do not think this line of cases would support the present contention even if their authority had been invoked by complainant.

But, as has already been stated, the right of the court to exercise jurisdiction in this case is also rested on *Lynn v. Polk*, 8 Lea, 121. It is unnecessary to state the nature of the controversy there involved. It is sufficient to say that the bill of complainants was there maintained on the ground that the act under which the defendants, and the funding board of the state, were proposing to act, was void for unconstitutionality.

This case, however, cannot be appealed to as authority by complainant save upon the ground that the act of 1899 is unconstitutional. The question is, Is this true?

It will be observed from the allegations of the bill hereinbefore set out, the gravamen of the complaint is that the defendant Crain is proposing to inspect and charge inspection fees as to oil "neither manufactured nor offered for sale in the state" within the purview of the act of 1899, and it is only should a construction otherwise be adopted that the question of its constitutionality is raised. In other words, if complainant's main contention is sustained—that is, that the oil in tanks Nos. 1 and 2 does not fall within the letter or intent of the act—the constitutionality or unconstitutionality is of no concern to the General Oil Company, and we would have presented in the record a pure academic ⁹³ question for consideration. It needs no citation of authority to the proposition that a court will not entertain such controversy.

The only question made on the face of the statute going to its constitutionality is, that the inspection fee of twenty-five cents a barrel is unreasonable, and much greater than necessary to provide for the expense of such inspection.

This question is of no concern, however, to complainant unless it be, as charged in the bill, that the oil, upon which defendant was about to impose inspection fees, was, in law, affected with interstate commerce. For it is only in the character of one engaged in such commerce that the objection is made. To answer this question, the court would be bound first to determine whether the oil in these tanks was in fact and in law, as claimed by complainant, a part of interstate commerce, and to do this, we would be bound to hold, and proceed upon the theory, that the court had jurisdiction of the whole controversy. This, we are satisfied, we cannot do.

This court, therefore, does what the chancellor should have done, sustains this ground of demurrer going to the question

of jurisdiction, and dismisses the bill at the cost of complainant.

It appearing, however, that a fund may have accumulated in the present case pending this litigation in the court below, and in this court, from payments made by the complainant, the cause is remanded to the chancery court in order that a disposition thereof may be made by that court.

The Principal Case was affirmed by the supreme court of the United States (General Oil Co. v. Crain, 28 Sup. Ct. Rep. 475), Justice McKenna delivering the opinion of the court as follows:

“Plaintiff in error, which was also plaintiff in the court below, invokes the protection of the commerce clause of the constitution of the United States against the collection of a tax for the inspection of certain of its oils in Tennessee. The bill prayed an injunction against the defendant, based on the following facts, summarized from the bill:

“The plaintiff is a Tennessee corporation with its principal place of business in Memphis, Tennessee. It is engaged in the manufacture and sale of coal oil and other illuminating oils in the various states of the Union. Its wells and refining and manufacturing plants are all located in the states of Pennsylvania and Ohio, from which it ships its product to the states in which they are sold and used. On account of the tendency of the oils to leak and evaporate, and, under change of temperature, to burst the vessel in which they are contained, it is necessary to ship the oils in tank-cars, and it is also necessary to have distributing points for such oils in various places in the United States, at which it may receive the oils so shipped, and place it in barrels or other small vessels suitable in size for filling orders, which vary in amounts from one barrel upward. It would be impracticable to carry on business in, or to have apparatus and machinery for the reception and delivery of, oil at every point at which plaintiff ships oil. For some years plaintiff has been engaged in business at Memphis, and has made that city not only a place of business at which to sell oil to the citizens and residents of Tennessee, but also has made it one of its distributing points to which its oils are shipped from Pennsylvania and Ohio in tank-cars, from which cars the oils are unloaded into various tanks, barrels, and other receptacles, for the purpose of being forwarded to its customers in Arkansas, Louisiana, and Mississippi, in which states it has many regular customers, from whom it always has on hand many unfilled orders for oil, to be delivered as soon as possible or convenient.

“At Memphis plaintiff has numerous tanks or receptacles for oil of various kinds and sizes, among which are the following: 1. A tank or vessel in which is kept oil for which orders have been received from the states above mentioned before its shipment from the manu-

facturing plants, and which is especially shipped to fill such orders. This oil is unloaded at Memphis only for the purpose of distribution in smaller vessels to meet the requirements of such orders, and is kept separate from oils for sale in Tennessee, in a tank plainly and conspicuously marked 'Oil Already Sold in Arkansas, Louisiana, and Mississippi,' and remains in Tennessee only long enough (a few days) to be properly distributed according to the orders therefor; 2. Another tank or vessel for oil to be sold in those states, but for which [there were] no orders at the time of shipment from the manufacturing plants. This tank is marked 'Oil to be Sold in Arkansas, Louisiana, and Mississippi,' and is kept separate and apart from all other oil until required to supply orders from plaintiff's customers in those states, and is never sold except upon the receipt of such orders.

"The defendant, as inspector of oils, from time to time inspects plaintiff's oils at Memphis, and charges and collects for such inspection a regular fee of twenty-five cents per barrel, as provided in section 8 of the act of 1899 of the legislature of Tennessee, and the plaintiff has fully paid such charges up to the present time on all of its oils shipped into Tennessee, whether intended for sale in that state or other states. Until recently plaintiff has unloaded the greater portion of its oil from its tank-cars to its stationary tanks without attempting to separate the oil sold or intended to be sold in the states above mentioned from that to be sold in the state of Tennessee, and paid the inspection charges upon all. Plaintiff, however, is now separating its oil in the manner above described, because it has been advised that the oil intended to be sold outside of Tennessee is not subject to inspection in that state if kept separate from the oil sold or intended to be sold in that state.

"Defendant claims the right to inspect such oils, although he knows and admits no sales thereof are made in Tennessee, and claims that he is not only entitled, but that it is his duty, to inspect the same and collect the regular fees in such inspection.

"Plaintiff is advised and shows that defendant has no right to inspect the oil or collect the fees, because the act of 1899 does not apply to them, for reasons which are elaborately set out; but it is alleged that, if the act should be construed to apply to them, the act is unconstitutional 'in so far as it provides for or requires an inspection of any of the oil in said tanks, because such inspection would be a regulation of and interference with commerce between the states of Pennsylvania and Ohio, from which said oil was shipped, and the states of Arkansas, Louisiana, and Mississippi, to which the same was shipped, in violation of the constitution and laws of the United States, and especially of the third clause of section 8 of article 1 of the constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."'

“Plaintiff alleges that the act of 1899 and the inspection thereunder is not a valid exercise of the police power of the state, and to that extent the act is unconstitutional and void, because (1) none of the oil is manufactured in Tennessee, and the inspection, therefore, is not necessary for the protection either of the residents and citizens of Tennessee or the reputation of her manufactured products; (2) the fees are unreasonable and exorbitant for the service performed, and very much greater than necessary to provide for inspection, and that, after payment of the salaries and other expenses incident to inspection, there is a surplus of many thousands of dollars put into the treasury annually; (3) the act is void under the constitution of the state of Tennessee, because the inspection is not necessary or conducive to the benefit of the state of Tennessee or the citizens thereof, and the act is therefore unnecessary, unreasonable, and not a valid exercise of the police power of the state, but a mere tax or charge imposed under the guise of a police regulation, and as such is in conflict with article 2, section 28 of the constitution of Tennessee, which requires all property to be taxed according to its value, and that taxes be equal and uniform throughout the state.

“It is alleged that the act provides in section 2 a heavy penalty, consisting of a fine from twenty dollars to fifty dollars for each offense, against any dealer or manufacturer who shall obstruct the inspector in the discharge of his duties, or refuse to permit him upon his premises for the performance thereof; and provides in section 4 that it shall be a misdemeanor for any person to sell any oil before having it inspected as provided in the act, and, on conviction, shall be fined three hundred dollars, and the oil, if found to be rejected, shall be forfeited and sold. Plaintiff, therefore, it is alleged, on account of the severe penalties, could not afford to take the risk of selling any oil without inspection, or take the risk of refusing permission to inspect. That it is doubtful if plaintiff, if it paid the fees under protest, could recover the same, and if they could be recovered it would be necessary for plaintiff to bring suit every thirty days for the charges paid for the preceding thirty days, so that an indefinite number of suits would be necessary. Irreparable injury will therefore result, it is alleged, if the inspection against plaintiff's oils under the act of 1899 be not enjoined.

“Defendant filed a demurrer which attacked the bill for want of equity, and also the jurisdiction of the court to hear and determine the cause, for the reason that it was a ‘suit against the state, or against an officer of the state, acting by authority of the state, with a view to reach the state, its treasury, funds, or property.’ By this ground of demurrer defendant attempted to avail himself of an act of the state of Tennessee, passed in 1873, being section 4507 of Shannon's Code, which provides as follows: ‘That no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the state, or any officer acting by the authority of the state, with a view to reach the

state, its treasury, funds, or property, and all such suits now pending, or hereafter brought, should be dismissed as to the state, or such officer, on motion, plea, or demurrer of the law officer of the state, or counsel employed by the state.'

'The demurrer was overruled 'as to that part of the bill in reference to the first tank mentioned in said bill.' It was sustained 'as to all that part of the bill in reference to the second tank mentioned in said bill.' The ground of demurrer which went to the jurisdiction of the court was overruled 'as to the oil in both tanks.'

'A preliminary injunction which had been granted was continued in force. Inspection, however, it was adjudged might proceed, the fees to be paid into court pending appeal to the supreme court of the state.

'An appeal was taken, and the supreme court decided that the suit was one against the state, and reversed the decree of the chancery court: 117 Tenn. 82, 95 S. W. 824.

'It is contended by defendant in error that this court is without jurisdiction because no matter sought to be litigated by plaintiff in error was determined by the supreme court of Tennessee. The court simply held, it is said, that, under the laws of the state, it had no jurisdiction to entertain the suit for any purpose. And it is insisted 'that this holding involved no federal question, but only the powers and jurisdiction of the courts of the state of Tennessee, in respect to which the supreme court of Tennessee is the final arbiter.'

'Opposing these contentions, plaintiff in error urges that whether a suit is one against a state cannot depend upon the declaration of a statute, but depends upon the essential nature of the suit, and that the supreme court recognized that the statute 'added nothing to the axiomatic principle that the state, as a sovereign, is not subject to suit save by its own consent.' And it is hence insisted that the court, by dismissing the bill, gave effect to the law which was attacked. It is further insisted that the bill undoubtedly presents rights under the constitution of the United States and conditions which entitle plaintiff in error to an injunction for the protection of such rights, and that a statute of the state which operates to deny such rights, or such relief, 'is itself in conflict with the constitution of the United States.'

'Plaintiff in error, to sustain its contention that the suit is not one against the state, but one to restrain 'unconstitutional aggression' by a state officer upon private property, cites many cases in this court. To these cases defendant in error makes no other reply than to say that they were cases in the federal courts and within the acknowledged range of the jurisdiction of courts, while the question presented by the motion to dismiss is not the rights plaintiff in error may have, but what remedies it has, and the power of the state over those remedies so far as its own courts are concerned. The difference is urged as material, and the following cases are adduced: *Semple v. Hagar*, 4 Wall. 431, 18 L. ed. 402; *Norton v. Shelby County*, 118 U. S. 425, 6

Sup. Ct. Rep. 1121, 30 L. ed. 178; *Smith v. Adsit*, 16 Wall. 185, 190, 21 L. ed. 310, 311; *Callan v. Bransford*, 139 U. S. 198, 11 Sup. Ct. Rep. 519, 35 L. ed. 144; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 601, 21 Sup. Ct. Rep. 493, 45 L. ed. 679, 689; *Newman v. Gates*, 204 U. S. 89, 95, 27 Sup. Ct. Rep. 220, 51 L. ed. 385, 389; *Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, 28 Sup. Ct. Rep. 34.

“A review of these cases becomes necessary. In *Semple v. Hagar*, Semple had a patent from the United States for a certain tract of land. He sued Hagar to quiet his title, alleging that Hagar claimed the land under a fraudulent Mexican grant, and a patent of the United States, issued in affirmance of the grant. Semple prayed that the grant be declared void ‘as issued upon false suggestion and without authority of law.’ Hagar demurred to the bill, on the ground, among others, that the court had no jurisdiction of the action. The demurrer was sustained and the case was brought to this court by writ of error. A motion to dismiss was made, which was granted. The court said: ‘We have here a very brief record, and, on the facts of the case, we cannot shut our eyes to the total want of jurisdiction under the twenty-fifth section or any other section of the judiciary act. It is plain that, if the court had assumed jurisdiction, and had declared the defendant’s patent void, for the reason alleged in the bill, the defendant would have had a case which might have been reviewed by this court, under the twenty-fifth section, and one on which there might have been a question and difference of opinion. But it is hard to perceive how the twenty-fifth section could apply to a judgment of a state court which did not decide that question, and refused to take jurisdiction of the case. The matter is too plain for argument.’ In other words, it was decided that the federal question must be decided before it can be reviewed. Apparently there was no thought of considering whether the question of jurisdiction was rightly decided. That was seemingly considered out of the power of this court to inquire into.

“*Norton v. Shelby County* was a writ to enforce the payment of certain bonds issued by the board of commissioners of Shelby county. One of the questions in the case was whether the board of commissioners was a legally constituted body. The supreme court of the state decided it was not, and this court accepted the decision as binding. ‘The determination made,’ we said, through Mr. Justice Field, ‘relates to the existence of an inferior tribunal of the state, and that depending upon the constitutional power of the legislature of the state to create it and supersede a pre-existing institution. Upon a subject of this nature the federal courts will recognize as authoritative the decision of the state court.’ *Claiborne County v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. Rep. 489, 28 L. ed. 470, 474, was cited.

“*Smith v. Adsit* was a suit for equitable relief against a sale of land which a third party had undertaken to make, in violation of an act of Congress. A decree was entered against Adsit for six thousand eight hundred and twenty-nine dollars, and dismissed as to other

defendants. The decree was reversed by the supreme court of the state, and the bill dismissed for want of jurisdiction, and the case was brought to this court by writ of error. A motion to dismiss was granted, Mr. Justice Strong, speaking for the court, saying: 'In view of this [the action of the state court] we do not perceive that we have any authority to review the judgment of the state court.' It was intimated in the opinion that a federal question had been presented, but it was not decided. 'As we have seen,' Mr. Justice Strong said, 'the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here.' And, further: 'It may well have been determined that the plaintiff's remedy against Adsit was at law, and not in equity, even if the sale from Holmes to him was utterly void. But, whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not is a question exclusively for the judgment of the state court.'

"In *Callan v. Bransford* a writ of error to the court of appeals of Virginia was dismissed on the ground that that court had disposed of the case on the ground that the matters involved were purely pecuniary, and that the amount in controversy in each case was less than sufficient to give the court jurisdiction under the constitution of the state. 'This being so,' this court said, 'we are of opinion that the writs of error to that court must be dismissed.'

"In *Freeport Water Co. v. Freeport*, we said: 'With what functions the circuit courts of the state [Illinois] may be invested may not be of federal concern. It is also a matter of construction, in which we might be obliged to follow the state courts.'

"In *Newman v. Gates*, the federal right was asserted under that provision of the constitution of the United States requiring due faith and credit to be given by each state to the public acts, records, and judicial proceedings of every other state. The supreme court of the state (Indiana) dismissed the appeal to it as not having been properly taken. The case was brought here, but dismissed. We said, through Mr. Justice White: 'As the jurisdiction of this court to review the judgments or decrees of state courts when a federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.'

"In *Chambers v. Baltimore & O. R. Co.* a statute of Ohio gave an action for death caused by the wrongful act in another state only when the death was that of a citizen of Ohio. The statute was attacked on the ground that it violated that clause of the constitution of the United States which entitles the citizens of each state to all the privileges and immunities of citizens in the several states. The statute

was sustained by this court. Mr. Justice Moody, speaking for the court, said: 'But, subject to the restrictions of the federal constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory action, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens, and withheld from the citizens of other states, is void, because in conflict with the supreme law of the land.'

"But in none of these cases was the same question presented that is presented here, nor were all of the cases cited by plaintiff in error to sustain the jurisdiction of this court cases in the federal courts. *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962, 29 L. ed. 185, and *Chaffin v. Taylor*, 114 U. S. 309, 5 Sup. Ct. Rep. 924, 962, 29 L. ed. 198, were brought in the state courts of Virginia, and they involve questions very much like those in the case at bar. *Poindexter v. Greenhow* was an action of detinue for personal property distrained by Greenhow for delinquent taxes, in payment of which Poindexter had tendered coupons cut from bonds issued by the state of Virginia under act of the state passed in 1871. This act, it was held, constituted a contract between the holder of the coupons and the state that they should be received for taxes, which contract, it was further held, was impaired by the subsequent act under which Greenhow justified the distraint of Poindexter's property.

"It was urged that the action could not be maintained because it was substantially an action against the state, to which it had not assented. It was further urged that the remedy was afforded of a right to recover back all the taxes after payment under protest, and that this constituted the sole remedy.

"The first contention was discussed at length and rejected. The court said, in effect, that the defendant in the action was sued as a wrongdoer, and could only justify himself under a valid law. And it was said: 'The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The constitution of the United States and its own contract, both irrevocable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law. . . . *He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense.*' (Italics ours.)

“A distinction was made between the state and its government, and it was said that an officer representing and acting for the latter is not an agent of the former. That and other cases were reviewed in *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 L. ed. 599, and Mr. Justice Gray, speaking for the court, said: ‘In a suit to which the state is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff’s property, contrary to a plain official duty requiring no exercise of discretion, and in violation of the constitution or laws of the United States.’ Cases were cited. And again: ‘But no injunction can be issued against officers of a state to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party.’ The case and those cited expose the error, which appears with a kind of periodicity, varied in presentation, to accommodate the particular exigency, that a state is inevitably brought into court when the execution of its laws is arrested by a suit against its officers. It seems to be an obvious consequence that, as a state can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt, without its consent, in the state tribunals, and exempt by the eleventh amendment of the constitution of the United States in the national tribunals. The error is in the universality of the conclusion, as we have seen. Necessarily, to give adequate protection to constitutional rights, a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the eleventh amendment to the constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the constitution; and the fourteenth amendment, which is directed at state action, could be nullified as to much of its operation. And it will not do to say that the argument is drawn from extremes. Constitutional provisions are based on the possibility of extremes. There need not, however, be imagination of extremes, if by extremes be meant a deliberate purpose to prevent the assertion of constitutional rights. Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry: See *Ex parte Young*, 209 U. S. , 28 Sup. Ct. Rep. 441, where this subject is fully discussed and the cases reviewed.

“The principles of the cases which we have cited were applied by the supreme court of Tennessee in *Lynn v. Polk*, 8 Lea, 121, where a suit against the funding board of the state was maintained against the contention that it was a suit against the state or against the officers of the state, within the meaning of the act of 1873, on the ground that an officer executing an unconstitutional statute is not acting by the authority of the state. The court, however, distinguishes that case from the one at bar by saying that plaintiff in error did not assail the inspection law for being void upon its face, but only on the ground ‘that the oil upon which defendant was about to impose inspection fees was in law affected with interstate commerce.’ To enter into the inquiry involved in the contention, it was further said: ‘The court would be bound first to determine whether the oil in these tanks was in fact and in law, as claimed by complainant, a part of interstate commerce; and to do this we would be bound to hold and proceed upon the theory that the court had jurisdiction of the whole controversy.’ And that the court declared it was precluded from doing by the act of 1873. In other words, refused to consider that which might bring the oils under the protection of the constitution of the United States.

“A similar distinction was attempted to be made in *Poindexter v. Greenhow*, supra, and the court replied by saying: ‘It is no objection to the remedy in such cases that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a state, which, in their general and proper application, are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts, prohibited by the constitution, or because, in some other way, they operate to deprive the party complaining of a right secured to him by the constitution of the United States.’ And inquiries of fact may be necessary to exhibit the unconstitutionality of a statute, as in *Reagan v. Farmers’ Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, and *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819.

“It being, then, the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by the court: *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. Rep. 72, 36 L. ed. 972.

“We are brought, then, to consider whether the law would, if administered against the oils in controversy, violate any constitutional right of plaintiff in error.

“As determining an affirmative answer to this question, it is contended that the oil in both tanks was in transit from the place of

manufacture, Pennsylvania, to the place of sale, Arkansas. The delay at Memphis, it is urged, was merely for the purpose of separation, distribution and reshipment, and was no longer than required by the nature of the business and the exigencies of transportation. The difference in the oil in tank No. 1 and that in tank No. 2, it is further said, is that the former was sold before shipment, and the latter was to be held in Tennessee for sale; but in neither case was the oil to be sold in Tennessee, and it is hence insisted that the interstate transit of the oil was never finally ended in Memphis, but was only temporarily interrupted there.

“The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475, 29 L. ed. 715, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257, the point of time at which it arrives at its destination. But intermediate between these points questions may arise: *State v. Engle*, 34 N. J. L. 425; *State etc. Coal Co. v. Carrigan*, 39 N. J. L. 35; *The Daniel Ball* (*The Daniel Ball v. United States*), 10 Wall. 557, 19 L. ed. 999.

“In *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. Rep. 415, 39 L. ed. 538, 5 Inters. Com. Rep. 30, coal in barges shipped from Pittsburg, Pennsylvania, to Baton Rouge, Louisiana, was stopped about nine miles above destination. It was held that it had ceased to be interstate commerce, and was subject to taxation by the state of Louisiana.

“In *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. Rep. 266, 47 L. ed. 394, logs in transit to a point without the state were held subject to taxation under a statute of the state, where they would ‘naturally leave the state in the ordinary course of transit.’

“In *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. Rep. 259, 47 L. ed. 359, a flock of sheep driven from a point in Utah across Wyoming to a point in Nebraska, for the purpose of shipment by rail from the latter point, was held to be property engaged in interstate commerce, and exempt from taxation by Wyoming under the statute taxing all livestock brought into the state ‘for the purpose of being grazed.’ There was no difficulty in the case except that which arose from the contention that the manner of transit was adopted as an evasion of the statute. Otherwise the grazing of the sheep was as incidental as feeding them would be if transported by rail. The pertinence of the case to the present controversy is in its summary of the principles of prior cases, expressed in the following passage: ‘The substance of these cases is that, while the property is at rest for an indefinite time, awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment.’ Property,

therefore, at an intermediate point between the place of shipment and ultimate destination, may cease to be a subject of interstate commerce. Necessarily, however, the length and purpose of the interruption of transit must be considered.

“In *State v. Engle*—coal mined in Pennsylvania and sent by rail to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment for the purpose of being shipped by water to other markets for the purpose of sale—it was held that the property was not subject to taxation in New Jersey. The court said: ‘Delay within the state, which is no longer than is necessary for the convenience of transshipment for its transportation to its destination, will not make it property within the state for the purposes of taxation.’ See, also, *State etc. Coal Co. v. Carrigan*, where coal also shipped from Pennsylvania to a port in New Jersey, and remained there no longer than was necessary to obtain vessels to transport it to other places, was held to be in course of transportation, and not subject to the taxing power of the state. In *Burlington Lumber Co. v. Willetts*, 118 Ill. 559, 9 N. E. 254, the principle was recognized that property in transitu was not subject to the taxing power of a state, but it was held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi river, a part of which were stopped at a place in Illinois called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were subject to taxation. The court said that the property was ‘kept at New Boston on account of the profit of the owners to keep it there’; and, further, that the company was engaged in business in the state, beneficial to itself, and its property was so located as to claim the protection of the laws of the state, and hence was liable to taxation.

“Like comment is applicable to plaintiff in error and its oil. The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in *State v. Engle*, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. ‘Complainant shows that it is impossible, in the coal-oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank-cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary in order to properly and conveniently unload and receive the oil from said tank-cars, and it would be impracticable, if not impos-

sible, to have such apparatus and machinery at every point to which complainant ships said oil.'

"This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary—a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538.

"We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws: *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 356, 18 Sup. Ct. Rep. 862, 43 L. ed. 195. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce.

"As our conclusion is that no constitutional right of the oil company was violated by the enforcement of the law of 1899, it follows that no error prejudicial to the company was committed by the supreme court of Tennessee, and for the reasons stated, its judgment is affirmed.

"HARLAN, J., Concurring. The fundamental question before the state court of original jurisdiction was whether it had jurisdiction, under the constitution and laws of Tennessee, of a suit like this. Manifestly, if that court was forbidden by the laws under which it was created to take cognizance of cases like this, it had no alternative but to dismiss this suit. The court overruled a demurrer to the bill, one of the grounds of demurrer being that the suit was one 'against the state or against an officer of the state, acting by authority of the state, with a view to reach the state, its treasury, funds, or property.' It thereby sustained its jurisdiction, and proceeded to a decree on the merits. The case being carried to the supreme court of Tennessee, that court reversed the judgment and held that no court of Tennessee could, under its statutes, take cognizance of this suit and give the decree asked. Upon that ground it did what it said the inferior state court should have done; namely, dismissed the suit for want of jurisdiction to give the relief asked.

"The statute of Tennessee which the supreme court of that state construed and held to be prohibitory of this suit was an act passed in 1873. It provides: 'That no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the state, or any officer acting by the authority of the state, with a view to reach the state, its treasury, funds, or property; and all such suits now pending, or hereafter brought, shall be dismissed as to the state, or such officer, on motion, plea, or demurrer of the law officer of the state, or counsel employed by the state.'

“The oil company seeks a reversal of the decree of the state court, contending that it was denied a right arising under the commerce clause of the constitution. But back of any question of that kind was the question before the supreme court of Tennessee, whether the inferior state court, under the law of its organization, that is, under the law of Tennessee, could entertain jurisdiction of the suit. The question, we have seen, was determined adversely to jurisdiction. That certainly is a state, not a federal, question. Surely, Tennessee has the right to say of what class of suits its own courts may take cognizance, and it was peculiarly the function of the supreme court of Tennessee to determine such a question. When, therefore, its highest court has declared that the Tennessee statute referred to in argument did not allow the inferior state court to take cognizance of a suit like this, that decision must be accepted as the interpretation to be placed on the local statute. Otherwise, this court will adjudge that the Tennessee court shall take jurisdiction of a suit of which the highest court of the state adjudges that it cannot do consistently with the laws of the state which created it and which established its jurisdiction. It seems to me that this court, accepting the decision of the highest court of Tennessee, as to the meaning of the Tennessee statute in question, as I think it must, has no alternative but to affirm the judgment, on the ground simply that the ground upon which it is placed is broad enough to support the judgment without reference to any question raised or discussed by counsel.

“What is said in the opinion of the court about the eleventh amendment is, I submit, entirely irrelevant to any decision of the present case by this court. That amendment relates wholly to the judicial power of the United States, and has absolutely nothing to do with the inquiry as to the jurisdiction of the inferior state court under the Tennessee statute of 1873. In determining what relief this court can or should give, in respect of the judgment under review, we need not consider the scope and meaning of the eleventh amendment; for it was long ago settled that a writ of error to review the final judgment of a state court, even when a state is a formal party and is successful in the inferior court, is not a suit within the meaning of the amendment: *Cohen v. Virginia*, 6 Wheat. 264, 408, 409, 5 L. ed. 257, 292.

“In my opinion, the decision of the supreme court of Tennessee, that the inferior state court was forbidden, by the law of its being, from taking cognizance of this suit, is conclusive here, and the judgment of that court should, therefore, be affirmed without reference to any other question raised or discussed.

“MOODY, J., Dissenting. I am unable to agree to the judgment in this case, for the reason that the statute here in question, as it was enforced against the property of the plaintiff in error, in my opinion was an interference with interstate commerce, which was beyond the power of the state. It is to be observed that the court below did

not construe the statute as applying to articles in the course of transportation between the states, and not destined for sale to consumers in the state, or, in other words, the court did not hold that the statute applied to the property here affected by it. On the contrary, the court expressly refrained from passing upon the merits of the controversy, and dismissed the bill for want of jurisdiction. We, however, have assumed jurisdiction of the controversy, for reasons given in the opinion of the court, in which I concur, and therefore cannot escape the duty of interpreting the meaning of the statute. I think we should, if it be possible, give to the statute a meaning which places its constitutionality beyond doubt. The law seems clearly to be designed to protect state manufacturers and consumers within the state. Its operation is limited by the words of the first section, which directs the governor to appoint inspectors for illuminating fluids 'which may be manufactured or offered for sale in the state.' Far from enlarging the meaning of these restrictive words, the other provisions of the law accord with and confirm them. The oil in tank No. 1, at least, which was neither manufactured in the state nor offered for sale in the state, is, by this interpretation, removed from the operation of the statute, and I think we ought so to decide.

"But, if it be assumed that the oil in tank No. 1 is subjected to inspection by the law, in my opinion the law is unconstitutional. The law is not sustained by the judgment of the court as an inspection law, which it purports to be. Perhaps it could not be under the doctrine announced and applied in *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862, 34 L. ed. 455, 3 Inters. Com. Rep. 185, and *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213, 34 L. ed. 862, 3 Inters. Com. Rep. 485. I am therefore relieved from considering whether the law, because it is a mere cloak for exacting revenue from interstate commerce, is bad as an inspection law. The judgment of the court treats it as such, and it is sustained not as an inspection, but as a revenue, law. I do not dissent from such an interpretation of its effect. But, with unfeigned deference to the opinions of my brethren, I venture to think that the statute, as enforced in the case at bar, is bad as a taxing law. The case of *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538, holds that articles, before they have ceased to be the subjects of interstate commerce, may still be reached by the taxing power of the state. Accordingly, it was held that the property of a citizen of another state, which had been brought into the state of Tennessee, placed in a warehouse for sale, and from there sold to persons within as well as without the state, was subject to a state tax. It was observed in the opinion in that case that the property had come to rest in the state and was enjoying the protection of its laws. But the case at bar, so far as it concerns the oil in tank No. 1, to which I confine my observations, is sharply distinguished from that case. The judgment here takes a step forward which I think ought not to be taken. The oil in that tank had been sold while in Pennsylvania and Ohio to

purchasers in other states than Tennessee, before it started in the course of interstate transportation. It was shipped especially in pursuance of such sales. It was in Tennessee only momentarily ('a few days'), for the purpose of repacking and reshipping it, and for no other purpose whatever. The delay was to meet the exigencies of interstate commerce, which arose out of the nature of the transaction. It does not seem to me important, if such be the case, that it would begin the remainder of its interstate journey under a new contract of shipment. It would no more seem to be the subject of state taxation than a drove of cattle, whose long interstate journey was interrupted, for humane reason, to give them a few days of rest and refreshment. With respect to this oil, no business whatever was done in the state except that which was required to conduct the transaction of interstate commerce begun in another state and to be completed in a third state. The single consideration that the property enjoys in Tennessee the protection of the laws of the state cannot be enough to justify state taxation. If that were so, all property in the course of interstate transportation would be subject to state tax in every state through which it should pass. I conclude that the oil in question was actually in the course of transportation between the states, was delayed in the state of Tennessee only for the purpose of conveniently continuing that transportation, and was therefore protected from state taxation by the commerce clause of the constitution: *Coe v. Errol*, 116 U. S. 525, 6 Sup. Ct. Rep. 475, 29 L. ed. 718; *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. Rep. 259, 47 L. ed. 359. Cases of taxation upon property before it has entered the channels of interstate transportation, or after the transportation has finally ended, seem to me to have no application. In the former class the property is taxable because it has not ceased to be a part of the mass of the property of the state; and in the latter class because it has come to rest as a part of the mass of the property of the state. Between those two points of time it is exempt from the taxing power of the state. In every case where the tax has been sustained there were facts present, regarded as essential by the court, which are absent here. The property had either not begun its interstate journey, as in *Coe v. Errol*, *ubi supra*, and *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. Rep. 266, 47 L. ed. 394, or it had ended that journey and was held for sale in common with other property in the state, as in *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257, *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. Rep. 415, 39 L. ed. 538, 5 Inters. Com. Rep. 30, and *American Steel & Wire Co. v. Speed*, *ubi supra*.

"Mr. Justice Holmes concurs."

A State cannot be Sued, either directly or indirectly by making one of its officers defendant, unless it has given its consent thereto by legislative authority: *Alabama Industrial School v. Addler*, 144 Ala. 555, 113 Am. St. Rep. 58; *Sanders v. Saxton*, 182 N. Y. 477, 108 Am. St. Rep. 826, and note.

HEBERT v. LEE.

[118 Tenn. 133, 101 S. W. 175.]

FIDELITY BOND—Failure to Disclose Defaults.—Where a general agent of an insurance company requires of a subagent a bond for the prompt accounting of moneys collected by him, but fails to disclose to the sureties, they making no inquiries, that the subagent is already indebted to him on account of known embezzlement, the sureties are relieved from liability, although the bond obligates them for prior as well as existing debts. The rule is otherwise, however, if the acts of the subagent do not involve moral turpitude, but are such as are consistent with honesty, and tend only to show him negligent, dilatory, or unskillful. In such case the law does not impose the duty on the obligee, unasked, to give the sureties information of such facts. (pp. 992, 993.)

P. M. Estes, for the appellant.

Slemons & Barthell and Templeton, Lindsay & Templeton, for the appellee.

¹³⁵ BEARD, C. J. The complainant was the general agent for Tennessee of the Provident Savings Assurance Society of New York, and as such had the power to appoint subagents in his territory, who were directly responsible to him for the conduct of the business done by them, while he was liable to his principal for any default on their part. On the 12th of March, 1902, he appointed the defendant Lee, of Knoxville, in this state, as a subordinate agent of the company, and at the same time entered into a written contract with him prescribing his duties and providing for his compensation. Under this contract Lee was to canvass for applications for assurance on the lives of individuals, and when obtained, forward them through complainant to the society for its action. One of its terms required Lee to collect and "forthwith pay over to the complainant all moneys collected by him for the society, less the amount he was entitled to receive for compensation." It was also provided therein that Lee should furnish bond, with satisfactory sureties, for the faithful performance of his duties growing out of this contract of agency, and that this bond was to be executed as a condition precedent to his employment. Notwithstanding this provision, Lee entered at once upon his agency. Subsequently, however, the complainant, whose residence was in Nashville, Tennessee, forwarded to Lee at Knoxville, Tennessee, a printed form of a bond in the penalty of two thousand dollars, with direc-

tion ¹³⁶ that he execute it and obtain two sureties upon it. On receiving this, on the 1st of July, 1902, having signed this bond himself and procured E. Buffat and Bruce Davis to execute it as his sureties, Lee returned it to complainant at Nashville, and the same was accepted by him. Subsequently Buffat, one of these sureties, died, and the complainant thereupon called upon Lee to execute another bond, and to this end sent him, as in the first instance, a printed form of a bond in the penalty of two thousand dollars, which he procured the defendant Luttrell to sign as his surety, when, having returned it to the complainant, the same was accepted by him. This bond was executed on the 6th of March, 1903, and on the 1st of May thereafter the relation between complainant and defendant Lee was dissolved and the latter was discharged, owing at the time to the former some sixteen hundred dollars, arising out of his conduct of this agency. The present bill is filed by the complainant against Lee, the principal, and Bruce Davis, Mrs. Helen Buffat, administratrix of E. Buffat, and James C. Luttrell, to hold them liable for the amount of this deficit. Lee, the principal, made no defense, and by his silence confessed the claim. Davis and Luttrell, as well as the administratrix of the deceased surety, defend, and say, among other things, that at the time of the execution of the two bonds in question Lee was a defaulter to the complainant, and that he and the complainant conspired together for the purpose of misleading the sureties by concealing the fact of this default, and by representing, ¹³⁷ as is alleged they did, "that the said Dan K. Lee was soliciting agent of the said Hebert, and was conducting a legitimate insurance business as such soliciting agent under the said Hebert."

The court of chancery appeals finds as a fact that at the time of the execution of the bond dated July 1, 1902, Lee was indebted to complainant in the sum of six hundred and ninety-three dollars and twenty cents, and from that date to March 6, 1903, the day of the execution of the second bond, his liabilities to complainant increased, until on that day it amounted to seventeen hundred and eleven dollars and ninety-one cents, and from this latter date to that of his dismissal it increased in the sum of one hundred and eighty-two dollars and seventy-one cents, making a total of liabilities accruing under the contract of agency of two thousand seven hundred and twenty-five dollars and seventy cents, less the sum

of one thousand and ninety-four dollars and five cents paid over from time to time by Lee to Hebert.

It is further found by that court that no communication passed between the complainant and the several sureties signing these bonds, and they signed the same without making any inquiry as to the condition of Lee's accounts, and without any misleading statement authorized by complainant to be made by Lee to them. So it is, if they are discharged from liability on these bonds, it will result from no affirmative action on his part, but from mere inaction, which the law will ascribe as a wrong done by him to these sureties.

We think there can be no doubt that the mere failure upon the part of the complainant to inform these sureties of the fact that their principal, Lee, had fallen behind from time to time in his accounts as agent, until ¹²⁸ his liabilities had amounted at the execution of these two bonds to the sums stated, would not be sufficient to relieve them from liability. If the present case was that—in other words, if this was a case in which the agent was simply behind in his accounts, and the complainant had failed to communicate, in the absence of investigation or inquiry upon the part of the sureties, this fact to them—we think this would not constitute a ground for resisting a recovery on these bonds. But the court of chancery appeals does not leave the case in that condition. That court finds, in words which admit of no other construction, that at the time of the execution of these several bonds Lee's liabilities grew out of the embezzlement of his principal's funds, and that he was at each of these dates a "defaulter" within the knowledge of complainant.

We think, upon this finding of facts, that a failure upon the part of the obligee to communicate the criminal conduct of Lee, out of which the existing indebtedness occurred, at the time of the making of these bonds, to the sureties upon them, although not inquired of by the sureties, was such conduct on his part as to relieve the sureties from liability. This principle, which it seems to us rests in sound morals, has been announced in many cases, the leading one of which, possibly, is that of *Phillips v. Foxhall*, L. R. 7 Q. B. 666. This case rested for authority, in part, upon *Smith v. Bank of Scotland*, 1 Dow, 272. In the course of the opinion delivered in the house of lords in that case, Lord Eldon ¹²⁹ said: "If a man found that his agent had betrayed his trust, that he owed him a sum of money, . . . if under such circumstances

he required sureties for his fidelity, holding him out as a trustworthy person, knowing or having ground to believe that he was not, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent."

In *State v. Sooy*, 39 N. J. L. 135, it was held "that a party taking a bond for the future good conduct of an agent already in his employment must communicate to his security his knowledge of the past criminal misconduct of such agent in the course of such past employment, in order to make such bond binding."

In *Dinsmore v. Tidball*, 34 Ohio St. 411, the action was upon the bond to indemnify the Adams Express Company against loss for the dishonesty or unfaithfulness of an agent. The agent was at the time in the employment of the company, and had been guilty of acts of embezzlement, which fact was not communicated to the surety. In disposing of the question raised by the surety upon this state of facts the court said: "Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent, is not bound under all circumstances to communicate to the guarantor every fact within his knowledge which increases the risk, yet we think there can be no doubt, either upon principle or authority, that, when an agent ¹⁴⁰ had acted dishonestly in his employment, the principal, with the knowledge of the fact, cannot accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge under such circumstances would be a fraud upon the guarantor."

In *Charlotte etc. R. R. v. Gaw*, 59 Ga. 685, 27 Am. Rep. 403, it was held, in applying the principle in favor of a surety where the dishonesty of the agent was discovered subsequent to the making of the bond, and yet was not communicated to the surety, that such agent, "being under bond to account and pay over daily, cannot be trusted with more money at the sureties' risk after dishonesty of the agent had been discovered by the corporation, but may be so trusted so long as the circumstances, fairly interpreted, do not point to moral turpitude, but to a want of diligence and punctuality, rather than to a want of integrity." The same principle is recog-

nized as being eminently sound in *Saint v. Wheeler etc. Mfg. Co.*, 95 Ala. 362, 36 Am. St. Rep. 210, 10 South. 539; in *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; in *Atlantic etc. Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621, and in *Newark v. Stout*, 52 N. J. L. 35, 18 Atl. 943.

The rule is otherwise if the acts of the agent, undisclosed to his surety, do not involve moral turpitude, but are such as are consistent with honesty, and only tend to show that the agent is negligent, dilatory or ¹⁴¹ unskilled. In such case the law does not impose the duty upon the obligee, unasked, to give the surety information of such facts. This distinctive principle is recognized in *Screwmen's etc. Assn. v. Smith*, 70 Tex. 168, 7 S. W. 793; *Atlas Bank v. Brownell*, 9 R. I. 169, 11 Am. Rep. 231; *Home Ins. Co. v. Holway*, 55 Iowa, 571, 39 Am. Rep. 179, 8 N. W. 457; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Domestic Sewing Machine Co. v. Jackson*, 15 Lea, 418.

It is true, as has been stated, that the complainant had no communication with the sureties upon these bonds, and that they were presented to and signed by them at the instance of Lee, their principal; yet we think this fact does not prevent them from availing themselves of the principle announced in *Phillips v. Foxhall*, L. R. 7 Q. B. 666, and the other cases to which reference has been made. The bonds were sent out by the complainant to Lee in order that he might obtain sureties upon them, and we can see no distinction between this case and one where the obligee personally presents the bond to the surety and obtains his signature to it, knowing at the time that the agent has been guilty of criminal offense theretofore in the management of his agency, and fails to communicate the fact to the surety. The presentation of the bond, without more, is an implied assurance, at least, that the agent has been guilty of no criminal delinquency in the management of the affairs of his agency; and we think the surety is as well discharged in the one case as in the other, if ¹⁴² without any knowledge of the existence of such default he signs the bond.

Nor do we think that the liability of these sureties, in view of the finding that Lee had been guilty of embezzlement of the obligee's funds theretofore, is affected by the recital in these bonds that the sureties undertook to become liable, not only for the debts that might be incurred by Lee after the

date of these bonds, but such moneys as he might owe to the obligee growing out of the affairs of his agency at that time. In the absence of the element which we find, as a matter of law, goes to the discharge of these sureties, there is no doubt upon these bonds that these sureties would have been liable, not only for debts incurred thereafter by Lee in the course of his agency, but for debts then existing. But the knowledge of the obligee that these debts were the result of dishonest dealings upon the part of Lee, uncommunicated to the sureties, in spite of this recital, can be availed of by the sureties in order to defeat recovery on these bonds: *Franklin Bank v. Stevens*, 39 Me. 532.

It follows, therefore, that the decree of the court of chancery appeals is affirmed.

For Authorities bearing upon the decision in the principal case, see the note to First Nat. Bank v. Fidelity etc. Co., 100 Am. St. Rep. 774, on fidelity insurance. As to the duty of the obligee in the bond of a public officer to disclose the past irregularities or the dishonesty of the principal, see Hudson v. Miles, 185 Mass. 582, 102 Am. St. Rep. 370; Milford v. Morris, 91 Iowa, 198, 51 Am. St. Rep. 338; Independent School Dist. v. Hubbard, 110 Iowa, 58, 80 Am. St. Rep. 271.

KENDALL v. STATE.

[118 Tenn. 156, 101 S. W. 189.]

WEAPONS—Offense of Carrying.—A Hack-driver who, with the intent of going armed, carries a pistol in a box under his seat on the hack, is guilty of unlawfully carrying weapons under the statutes of Tennessee. To constitute the offense, it is not necessary that the weapon, unless it is a razor, should be carried concealed about the person. (p. 996.)

W. C. Cherry, for the appellant.

Assistant Attorney General Faw, for the state.

¹⁵⁷ SANSOM, S. J. Plaintiff in error was indicted in the criminal court for Davidson county for carrying a pistol unlawfully. He was tried before the judge without a jury, and found guilty, and a fine assessed of fifty dollars and costs against him. His motion for a new trial having been overruled, he has appealed to this court.

The facts are very simple, and consist of a short statement by a single witness, from which it appears that plaintiff in error was a hack-driver, and that on the 20th of September, 1905, in Nashville, Davidson county, Tennessee, he became involved in a difficulty with one Perry Cotton, who, with a large stick, attacked him, and either struck or struck at him several times with the stick, plaintiff in error being at the time seated on the driver's seat of the hack. While Cotton was so striking or striking at him with his stick, plaintiff in error arose from the seat, lifted up the top thereof, and, reaching into a box or compartment under it, drew forth a pistol which he had previously placed there, and with this pistol fired one shot at Cotton, his assailant, who thereupon ran, and plaintiff in error then replaced the pistol in the box or compartment under the seat from which he had drawn it. These are the entire facts as disclosed by the record.

The insistence is that, under the facts stated, plaintiff in error is not guilty of the offense with which he is charged and of which he had been convicted, and the ¹⁵⁸ judgment should therefore be reversed and the case dismissed. The presentment is predicated on section 6641 of Shannon's Code, which reads as follows: "It shall not be lawful for any person to carry publicly or privately any dirk, razor concealed about his person, sword cane, loaded cane, slungshot or brass knucks, Spanish stiletto, belt or pocket pistol or revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand."

The offense against the law under this enactment is the carrying of any of the forbidden weapons with the intent of going armed. The law may be violated just as fully and completely by the carrying of the weapon in his handbag as in his pocket. It is the carrying with the purpose of going armed that is the offense, and not the concealment about the person, with the single exception of the razor. This must be concealed about the person in order to constitute a violation of the terms of the statute for its carrying. It is the practice of going armed that is purposed to be corrected and prohibited by this salutary legislation, a practice the law-making branch of the government purposed and intended in the passage of this act to stop as far as possible, and which laudable purpose the courts of the state should uphold and sustain by a fair and impartial, but full and complete, administration of the law.

It has been held that the carrying of a navy pistol in a scabbard hung to the saddle while riding along a ¹⁵⁹ public road is a violation of this statute: *Barton v. State*, 7 Baxt. 105. Likewise that the carrying of a pistol in a sack in the hand is within the statute, if so carried with the intent to go armed: *Robinson v. State*, 3 Shan. Cas. 60. It is within the statute, and indictable, to carry any kind of a pistol (except an army or navy pistol, openly in the hand) in any way, whether concealed about the person, or openly in the hand, or in a handbag, or in a sack, or in the box or compartment beneath the seat of a vehicle being used, or otherwise, for purposes of going armed, where the weapon is being so carried as that it is readily accessible and available for use in the carrying out of purposes either offensive or defensive. The idea seems to obtain that the weapon must be concealed about the person in order to constitute a violation of the statute, but such is not the case, except in respect of the razor.

There is no error in the judgment of the lower court, and it is affirmed, with costs.

Statutes Forbidding the Carrying of Arms or deadly weapons by private individuals are constitutional: See Salina v. Blakesley, 72 Kan. 230, 115 Am. St. Rep. 196, and note. One may be guilty of carrying concealed weapons while alone in his own home: *Dunston v. State*, 124 Ala. 89, 82 Am. St. Rep. 152.

NASHVILLE RAILWAY AND LIGHT COMPANY v. TRAWICK.

[118 Tenn. 273, 99 S. W. 695.]

APPEAL.—A Bill of Exceptions Filed After the Time allowed by order of the trial judge when the final judgment was entered is not a part of the record. (p. 997.)

APPEAL.—Minute Entries are a Part of the Record without a bill of exceptions, so that assignments of error thereon based may be considered on appeal. (p. 998.)

JOINT TORT-FEASORS—Several Verdict.—When two or more persons are charged with a joint tort, and all are found guilty, the jury cannot assess several damages. The damages must be assessed jointly, against all jointly, although all may not be equally culpable. (p. 999.)

JOINT TORT-FEASORS—Several Verdict, How Corrected.—When the jury returns a several instead of a joint verdict against

joint wrongdoers, the irregularity may be cured by the plaintiff taking judgment against one of them in the amount awarded against him by the jury, and entering a nolle prosequi as to the others. (p. 1000.)

JOINT TORT-FEASORS—Several Verdict, How Cured.—A several verdict against two joint wrongdoers can be cured by the court, on motion of the plaintiff, even after judgment is entered, dismissing the case as to one defendant, after granting a new trial as to him, and rendering judgment against the other alone for the amount of the verdict awarded against him. (p. 1002.)

J. J. Vertrees, J. C. Bradford and R. F. Jackson, for the appellant.

Parks & Bell and P. D. Maddin, for the appellee.

275 WILKES, J. This is an action for damages for personal injuries. It was brought against the Nashville Railway and Light Company and the city of Nashville jointly. There was a trial before a jury in the court below, resulting in a verdict and judgment for the plaintiff; and the defendant railway and light company has appealed to this court. A new trial was awarded the city of Nashville, and thereupon the suit was dismissed as to it. Numerous errors are assigned by the railway and light company going to the merits of the case and based upon the bill of exceptions. These cannot be considered, inasmuch as the bill of exceptions is not properly a part of the record, having been filed after the time allowed by order of the trial judge when the final judgment was rendered: *Wright v. Redd Bros.*, 106 Tenn. 719, 63 S. W. 1120; *Hinton v. Sun Life Ins. Co.*, 110 Tenn. 118, 72 S. W. 118; *Jones v. Moore*, 106 Tenn. 188, 61 S. W. 81; *Muse v. State*, 106 Tenn. 181, 61 S. W. 80; *Bettis v. State*, 103 Tenn. 339, 52 S. W. 1071.

A question is made, however, as to the validity and legality of the verdict and judgment of the court below, and this, being based upon the minute entries, can be **276** considered, since such entries are a part of the record without a bill of exception.

The jury returned a verdict that "they found the issues in favor of the plaintiff, and by reason of the premises assess his damages in the sum of \$7,250. Seven thousand dollars of this amount the jury awarded to the plaintiff A. M. Trawick and against the Nashville Railway and Light Company, and the costs, for which let fieri facias issue. And they find for the plaintiff and against the defendant mayor and city council of Nashville in the sum of \$250 and costs, for which let fieri facias issue."

The court upon this verdict rendered judgment as follows: "It is therefore ordered, adjudged, and decreed by the court that the plaintiff recover of defendants the respective sums of \$7,000 against the Nashville Railway and Light Company and \$250 against the mayor and city council of Nashville, making in all the sum of \$7,250, and the costs of this cause, for all of which let fieri facias issue."

The Nashville Railway and Light Company moved in arrest of judgment upon the ground that there should have been but one judgment, and that the judgment for separate amounts against each of the defendants—\$7,000 against the Nashville Railway and Light Company and \$250 against the mayor and city council of Nashville—was unlawful and void. This motion was denied.

The motion in arrest of judgment is as follows: ²⁷⁷ "Defendant Nashville Railway and Light Company moves the court that the judgment in this case be arrested on the ground and for the reason that under the pleadings in this cause there could be but one judgment; that there could not be, and ought not to have been, judgment for separate amounts against each of the defendants, to wit, \$7,000 against the Nashville Railway and Light Company and \$250 against the defendant mayor and city council; and that in this case, which was on a tort against both defendants, verdict and judgment thereon for separate amounts against each defendant were not lawful or admissible, and are void."

The Nashville Railway and Light Company moved the court to change the verdict, as already entered upon the minutes, so that, instead of its reading that the jury found the issues in favor of the plaintiff and assessed his damages at \$7,250, of which it assessed or awarded the plaintiff \$7,000 against the railway and light company and \$250 against the mayor and city council of Nashville, that portion of it would read that they found the issues in favor of the plaintiff as against the Nashville Railway and Light Company and assess his damages against the Nashville Railway and Light Company in the sum of \$7,000, and that they further find the issues in favor of the plaintiff and against the mayor and city council of Nashville and assess his damages against the mayor and city council of Nashville in the sum of \$250.

A number of jurors were called into open court, on ²⁷⁸ April 20, 1906, and examined with reference to what they had found and reported.

The evidence of the jurors as to what they intended we cannot consider, as it is not properly made a part of the record, but is contained in the rejected bill of exceptions.

The plaintiff moved the court for a new trial as to the mayor and city council of Nashville, which was granted, and the plaintiff then dismissed the case as to the mayor and city council. Plaintiff's counsel, at the time he made the motion, stated to the court and to all the parties that it was his intention, if the court granted the motion for a new trial, to dismiss the suit as to the mayor and city council of Nashville.

After the suit had been dismissed as to the mayor and city council of Nashville, the plaintiff moved the court to render a judgment in favor of the plaintiff and against the Nashville Railway and Light Company for \$7,250, and to disregard the apportionment of the damages which the jury had undertaken to make. The court granted this motion and gave a judgment accordingly.

We think the verdict rendered by the jury was irregular and erroneous.

In *Railroad v. Jones*, 100 Tenn. 512, 45 S. W. 681, it was held, in substance, that when two or more persons are charged with a joint trespass, and both, or all, are found guilty, the jury cannot assess several damages, but they must be assessed jointly, against all jointly, although all may not be equally culpable. Quite a number ²⁷⁹ of cases are cited in that opinion, and to these may be added a great weight of authority holding the same doctrine: *Jones v. Grimmet*, 4 W. Va. 104; *Crawford v. Morris*, 5 Gratt. (Va.) 90; *Bohun v. Taylor*, 6 Cow. (N. Y.) 313; *Wakely v. Hart*, 6 Binn. (Pa.) 316; *Bostwick v. Lewis*, 1 Day (Conn.), 34, 2 Am. Dec. 73; *Washington Gaslight Co. v. Lansden*, 172 U. S. 553, 19 Sup. Ct. Rep. 296, 43 L. ed. 543; *Chils v. Gronlund* (C. C.), 41 Fed. 505.

The question is now presented whether this irregularity, and the subsequent steps taken, vitiate the judgment and verdict, or whether, as finally entered, the judgment was correct and warranted.

The contention of the defendant is that the verdict and judgment were void, and could not be validated by any act of the trial judge. The insistence of the plaintiff is that the judgment was merely irregular, but not void, and that proper judgment could be rendered thereon.

It is contended that the verdict is complete when it finds the issues in favor of the plaintiff and assesses his damages at the sum of \$7,250, and that the remainder of the verdict, apportioning this amount separately, is mere surplusage, and might have been stricken out. But, if this view be not correct, then the plaintiff could ask for judgment against the light company for \$7,250, and dismiss as to the city; and that is virtually what was done.

In regard to verdicts of this character, there appears to be four distinct lines of procedure laid down by the authorities. The first class holds that the verdict ²⁸⁰ should be set aside and a new trial awarded: *Whitaker v. Tatem*, 48 Conn. 520; *Washington Gaslight Co. v. Lansden*, 172 U. S. 553, 19 Sup. Ct. Rep. 296, 43 L. ed. 543; *Chils v. Gronlund* (C. C.), 41 Fed. 505.

The second class holds that where the jury finds the amount of damages to which the plaintiff is entitled, and finds each of the defendants guilty, this fixes the plaintiff's right to recover the full amount against the guilty parties, and that the effort of the jury to apportion the damages among the several guilty defendants is mere surplusage, and the plaintiff may take judgment against all for the total damages awarded. This is the holding of *Post v. Stockwell*, 34 Hun (N. Y.), 373; *Central Pass. Ry. v. Kuhn*, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; *Currier v. Swan*, 63 Me. 323; *Beal v. Finch*, 11 N. Y. 128.

The third class holds that the plaintiff may elect his best damages, and enter judgment for this sum against all the defendants found guilty jointly. Cases holding this view are *Halsey v. Woodruff*, 9 Pick. (Mass.) 555; *Dougherty v. Dorsey*, 4 Bibb (Ky.), 207; *Sodousky v. McGee*, 4 J. J. Marsh. 267; *Hoffman v. Schwartz*, 11 Civ. Proc. Rep. (N. Y.) 200; *Beal v. Finch*, 11 N. Y. 128.

The fourth class, which contains the great weight of authority, holds that the plaintiff may select which one of the defendants he will take judgment against, and may enter a nolle prosequi as to the others, and have his judgment against this one in the amount the jury awarded against him, and this cures the irregularity ²⁸¹ in the verdict awarding several damages. Some of the authorities holding this view are: *Sutherland on Damages*, 3d ed., p. 1268, col. 2; *Caruthers' History of a Lawsuit*, 4th ed., p. 295, sec. 34; *Davis v. Chance*, 2 Yerg. 94; *Warren v. Westrup*, 44 Minn. 237, 20 Am. St.

Rep. 578, 46 N. W. 347; Crawford v. Morris, 5 Gratt. (Va.) 90; St. Louis & A. T. H. R. R. v. South. 43 Ill. 176, 92 Am. Dec. 103; Hardy v. Thomas, 23 Miss. 544, 57 Am. Dec. 152; Ammonett v. Harris, 1 Hen. & M. (Va.) 488; Bulkley v. Smith, 1 Duer (N. Y.), 643; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702. The English authorities are: Saloman v. Smith, 1 Saund. 207; Mitchell v. Millbank, 6 Term Rep. 199; 1 Tidd's Practice, p. 682; Rodney v. Strode, 3 Mod. 101, Carth. 19, cited in Heydon's Case, 11 Coke, 7a, 7b, in vol. 6, State Library.

Caruthers' History of a Lawsuit, edition of 1866, page 239, section 374, says:

"The same damages must be found against all the defendants jointly. It is a joint right of the plaintiff, and, if a verdict separates the defendants in regard to the damages, they will be instructed to retire and find the damages joint. If that is not done, if they have rendered their judgment for separate damages against different defendants, it is said in 1 Parsons on Contracts, 28, that the plaintiff may elect which sum he will, and, remitting the others, enter judgment for this sum against all the defendants.

"In Davis v. Chance, 2 Yerg. 94, it is said that in ²⁸² such case 'the plaintiff must elect to take judgment against only one of the defendants for the amount found against him, and enter a nolle prosequi as to all the other defendants.'

"It would seem that the error of the jury ought not to deprive the plaintiff of his right to a joint judgment against all the wrongdoers, and that the highest amount the jury had given against any one of the defendants was deemed by them due compensation only for the injury."

In the case of Davis v. Chance, 2 Yerg. 94, it was held that if several defendants, sued in trespass, plead jointly, and they are all tried together at the same time, there should be but one assessment of damage, and one judgment upon it, or if, when all tried together at the same time, there be several damages assessed, there can be only one judgment upon one of these assessments, and a nolle prosequi as to the others.

The holding in the case of Davis v. Chance, 2 Yerg. 94, as to the feature of the case we are now considering, has not been overruled or changed in any way, and is not contrary to the holding in Knott v. Cunningham, 2 Sneed, 204.

We think that the great weight of authority is to the effect that such an error or irregularity in the verdict and judg-

ment in the court below can be remedied by the mode of proceeding followed in this case; and what was done in this case is virtually in accord with the authorities we have cited.

²⁸³ It is said, however, that the nolle prosequi should have been entered before judgment, and the inferential argument is made that it could not be done afterward; but such was not the holding in *Davis v. Chance*, for in that case the judgments of the court below were reversed in this court, and the cause was remanded to the court below, that the plaintiff might enter there a judgment against one or the other of the defendants, at his election, for the damages assessed to him, against whom he shall take judgment, entering a nolle prosequi as to the others.

We can see no good reason why the plaintiff might not remit \$250 of this judgment against the light company in this court, and that company cannot complain.

It follows that the judgment of the court below must be affirmed (less the amount of \$250 remitted); that is, judgment will be entered here against the light company in favor of the plaintiff for \$7,000, without interest, and for costs.

Damages may be Severed Against Joint Trespassers, with the right on the part of the jury to punish the wrongdoer to the extent of his participation in the wrongful act, and to punish him more severely than the others if he is more guilty than they: Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309.

MALONE v. WILLIAMS.

[118 Tenn. 390, 103 S. W. 798.]

CITY BOUNDARIES.—A Statute Extending the Boundaries of a city and annexing new territory thereto is within the power of the legislature to enact. (p. 1011.)

POLICE POWER.—A Statute Authorizing the Officers of a City, within the city and for ten miles beyond its limits, to enter and examine all buildings and ascertain their condition for health or safety, to remove such as are dangerous, to direct and regulate the construction of fire walls, fences, smokestacks, etc., and authorizing the president of a commission having control of the city to abate in a summary manner any nuisance, whenever in his opinion one exists, at the cost of the owner of the premises, violates the rule that no man shall be deprived of life, liberty, or property without due process of law. (p. 1015.)

POLICE POWER—Cow Stables and Piggens.—The legislature cannot empower a city to prohibit by ordinance piggens, cow stables, and dairies for two miles beyond the city limits. (p. 1016.)

POLICE POWER—Exercise by City Beyond Its Limits.—A statute is unconstitutional which provides that a city may have and exercise, within its limits and for two miles outside thereof, all governmental and police powers. (p. 1016.)

PUBLIC SCHOOLS—Power of City to Establish.—A statute empowering a city to establish public schools within its borders is not unconstitutional. (p. 1018.)

TAXATION—Inequality—Adding Expense of Survey.—A statute requiring the owners of property in the city of Memphis not laid off in lots or blocks to furnish the assessor a description thereof, and providing that if they fail to do so he may require the city engineer to make a survey, the expense of which shall be added to the tax levied on the property, violates the constitutional provisions that all property shall be taxed according to its value, and that taxes shall be equal and uniform throughout the state. (p. 1018.)

DISTRAINT FOR TAXES—Class Legislation.—A statute permitting tax officers in one city of the state to distrain, under certain circumstances, for taxes not delinquent, when nowhere else in the state are they permitted to distrain for taxes unless delinquent, creates an unconstitutional discrimination in favor of that city. (pp. 1019, 1020.)

TAXATION—Due Process of Law.—A statute authorizing the enforcement of personal taxes, whether delinquent or not, by distress and sale of personal property, in case the one against whom the assessment is made has removed, or is about to remove, himself or his personal property from the city, violates the constitutional principle that no man shall be deprived of life, liberty, or property without due process of law. (p. 1020.)

TAXATION—Discrimination in Favor of Corporate Stock.—A statute making taxes on shares of stock delinquent on the first day of September, but making taxes on other kinds of property delinquent on July 1st, is unconstitutional as an unreasonable discrimination in favor of the owners of stock. (p. 1020.)

TAX SALE—Discrimination Against Claimant.—A statute providing that if any person claiming title to land in the city of Memphis under a tax deed shall be defeated in an action to recover the premises, the successful claimant shall pay such person the amount paid by the purchaser at the tax sale and any amounts paid by him for taxes, with interest thereon, together with costs, is unconstitutional. (p. 1022.)

TAX SALE—Due Process.—A Statute Providing that No Error in any assessment, tax-book, notice, advertisement, etc., relating to the assessment, levy, or collection of taxes in the city of Memphis, shall affect the validity of any sale or other proceeding for their collection, is in violation of the rule that no man shall be deprived of life, liberty, or property without due process of law. (p. 1023.)

APPEALS—Class Legislation.—A Statute providing that the city of Memphis, in prosecuting an appeal or writ of error, shall give bond, but is released from the obligation of law to furnish security therefor, is unconstitutional as class legislation. (p. 1023.)

FERRIES—Power of City to Regulate.—A statute giving the city of Memphis exclusive power to regulate and license ferries within the limits of the city is unconstitutional as a delegation to the city of power which belongs to the county court. (p. 1024.)

ELECTIONS—Class Legislation.—A statute taking the city of Memphis out of the operation of the general election statute and placing it in a class by itself, whereby in the use of the elective franchise it is relieved from burdens imposed upon other communities, and its people deprived of safeguards vouchsafed to other communities, is unconstitutional. (p. 1027.)

CONSTRUCTION OF STATUTE.—While the Legislative History of an act may be consulted as throwing light upon its meaning and purpose, still in determining whether a statute is an independent repealing act or an amendatory act, no controlling force can be attached to the fact that it was first introduced as an independent act and then withdrawn and introduced as an amendatory act, for the purpose of escaping the prohibition of the sale of liquors in Memphis. (p. 1030.)

TITLE OF STATUTE—Amendatory or Repealing Act.—If the caption of an act shows that it was intended by the legislature as an amendatory act, while the body shows it, in direct or express terms, to be a repealing act, the act is void. (p. 1030.)

TITLE OF STATUTE—Amendatory or Repealing Act.—The Opinion of the Legislature expressed in the title of an act that it is amendatory is not conclusive. Whether the act amends or repeals another is a judicial question to be determined from the body of the act. (p. 1031.)

REPEAL OF STATUTE.—An Act Embracing a Full Scheme of legislation upon a subject operates as a repeal of prior acts on the same subject. (p. 1032.)

TITLE OF STATUTE—Amendatory or Repealing Act.—A statute whose caption purports an amendment of a city charter, but whose body embraces a new charter, and therefore really operates as a repeal of the prior charter, offends the constitutional provision that the subject of an act shall be expressed in its caption. (p. 1044.)

STATUTE VOID IN PART—When Void in Toto.—When portions of a statute, rejected as in themselves unconstitutional, are not so merely incidental and subordinate that they can be stricken out without in any sense impairing the efficiency of the act, and are so numerous that it cannot be said that the legislature would have passed the act with these left out, the whole act must fall. (p. 1045.)

TITLE OF STATUTE.—An Act to Modify and Change in certain respects the form of government of the city of Memphis and to amend its existing charter'' cannot properly include provisions relative to state and county revenue, provisions giving the city exclusive authority to license ferries within its borders, and provisions authorizing the mayor to abate nuisances within a radius of ten miles beyond the city limits. (p. 1045.)

OFFICE—Power of Legislature to Abolish.—An office is a species of property, and the legislature cannot constitutionally legislate an officer out of that property while leaving the office with its duties unimpaired, for this would be taking property without due process of law. (pp. 1042, 1046.)

OFFICER—Power of Legislature to Abolish.—The legislature can abolish an office and thereby abrogate the rights and duties of the officer, but it cannot leave the office standing and abolish the officer. Therefore, a statute abolishing the offices existing under the charter of a city and creating others substantially the same as the former ones, although with new names and somewhat enlarged duties, is void. (pp. 1042, 1054.)

G. T. Fitzhugh, T. K. Reddick, T. B. Turley and John E. Bell, for the complainants.

E. E. Wright, R. E. Maiden and Thomas M. Scruggs, for the defendants.

⁴⁰¹ NEIL, J. The bill in this case was filed by certain persons who were elected as officers of the city of Memphis under its charter as it existed prior to March 27, 1907, against certain other persons claiming to be officers of the same city by appointment of the governor under an act passed on the date last mentioned.

The purpose of the bill was to have the above-mentioned act of March 27, 1907 (Senate Bill No. 289), declared unconstitutional and void.

It is alleged that the act referred to was first introduced as an independent act, imposing upon the city of Memphis a new charter, and that this act bore the following title: "An act to grant a new charter to the city of Memphis, to repeal an act entitled 'An act to establish taxing districts in the state, and to provide the means of local government for the same'; and being chapter 11 of the acts of 1879, and all the acts amendatory thereof, constituting the charter of the city of Memphis, and to repeal chapter 54 of the acts of 1905, entitled 'A bill to be entitled "An act to amend an act entitled 'An act to establish ⁴⁰² taxing districts in this State and to provide the means of local government for the same,' " ' the same being chapter 11 of the acts of 1879 and all the acts amendatory thereof, constituting the charter of the city of Memphis.'"

It is further alleged that at the time the bill bearing the above caption was introduced there was pending in the legislature a bill known as the "Pendleton bill," with every prospect of the latter passing and becoming a law; that the result of passing the new charter as an independent act, the Pendleton bill becoming a law in the meantime or thereafter, would be to prohibit the sale of intoxicating liquors in the city of Memphis, and that in order to avoid this result, the bill as originally introduced was withdrawn by the parties in charge of the legislation, and a new bill—that is, Bill No. 289—was introduced, purporting in its caption to be an amendment of the former act, rather than a new and independent one. A copy of the bill, the title of which is above given, as first introduced, was exhibited with the com-

plainants' bill in equity in the present case, and on comparison it appears to be substantially the same as the act of March 27, 1907 (Senate Bill No. 289), under examination herein.

It is alleged that, notwithstanding the caption of the act of March 27, 1907, purporting an amendment of the former charter of Memphis, the body of the bill shows a new and independent scheme of legislation covering the ⁴⁰³ whole subject, and thereby, if good, effecting an implied repeal of the former charter; and therefore that, while the caption of the act purports an amendment, its body purports a repeal, and hence the caption and the body are in conflict, article 2, section 17, of the constitution of the state is thereby violated, and the act is void.

It is further alleged that the act is void because several special matters embraced in the body of it are not covered by the title, and for these reasons it is in violation of article 2, section 17. These special matters need not be set out at this point, but will be presently referred to with more particularity.

It is alleged that, "if the said defendants are permitted to carry out their unlawful purpose of the government of the said city, complainants will be deprived of the benefits and emoluments of the offices to which they have been justly elected and which they are lawfully entitled to hold and enjoy until the expiration of their respective terms"; that they are legally required to hold their various offices until the expiration of their terms, and their successors are duly elected and qualified; that "they will suffer irreparable injury on account of the illegal acts of the defendants, unless said defendants are restrained by the court, and they have no adequate remedy at law."

These allegations were made, following other allegations to the effect that the defendants were threatening to take charge of the city government under the ⁴⁰⁴ act of March 27, 1907, and would take charge of it unless restrained.

The bill was filed by James H. Malone, mayor of the city, and B. H. Henning, a member of the board of fire and police commissioners, George C. Love, a member of the board of public works and chairman of that board, J. S. Dunscomb, R. A. Utley, E. H. Crump, and Frank H. Hill, members of the board of public works, and A. C. Floyd, judge of the city court; and it was alleged that under the charter of the

city as it existed prior to the act of March 27, 1907, the term of each of these officers ran until January 11, 1910, except that of George C. Love, which latter expired in January, 1908.

The bill was filed against the following persons, all appointed by the governor, pursuant to the terms of the said act of March 27, 1907, viz.: J. J. Williams, John T. Walsh, David S. Rice, E. B. Le Master, and Sidney M. Neely, members of the commission provided for in the said act, J. J. Williams having been appointed president, John T. Walsh, vice-president, and the defendants David S. Rice, E. B. Le Master and Sidney M. Neely members of the said commission, and the defendant George G. Alban appointed judge of the court designated in the act as the "corporation court."

The bill alleged that these defendants were about to take charge of the city government, thereby ousting the complainants; that said contemplated act was wrongful ⁴⁰⁵ and would result in great confusion in the affairs of the city.

There was a prayer for process against the defendants, and for a temporary injunction against interference with the city government until the matter could be heard by the chancellor, and that on final hearing the injunction be made perpetual.

A bill was filed April 24, 1907, and on the same day a temporary restraining order was issued against the defendants. On the 26th of the same month the chancellor heard the application for a temporary injunction, and disallowed it on May 4th, and on that day he vacated the temporary restraining order.

On the 6th of May the defendants filed a demurrer to the bill, assigning numerous grounds, all of which are embraced in the first one, which is that there is no equity in the bill. On the same day the chancellor sustained the demurrer and dismissed the bill. From this decree the complainants prayed and obtained an appeal to this court and have here assigned errors.

The errors assigned are as follows: "The chancellor erred (1) in not declaring the act in question unconstitutional because it repeals the former charter of the city of Memphis, while purporting in the caption only the amendment of it; (2) in holding that the act in question was only an amendment to the former charter, and not a new charter for the city of Memphis; (3) in holding that the legislature had the

power to remove municipal officers without abolishing their offices; ⁴⁰⁶ (4) in holding that the act in question is in all respects constitutional, and in denying complainants the relief prayed for."

The assignments present, from different points of view, the single question whether the act of March 27, 1907, is unconstitutional in whole or in part; but the solution of this general question requires the consideration and disposition of many particular contentions advanced by the parties. We shall not take up these controversies in the order in which they are presented in the assignment of errors or in the briefs of counsel, but in that order which seems to us the most convenient.

It is alleged in the bill that the act of March 27, 1907, violates the constitution in the following particulars, viz.:

"1. In section 2 of article 1 of said act it undertakes to extend the boundaries of said city and annex new territory thereto.

"2. In section 3 of article 1 it is provided that said city is to 'have and exercise within the city limits and for two miles outside thereof all governmental powers and police powers, subject to the limitations prescribed by the constitution and laws of the state and of the United States.'

"Within the two-mile strip over which the city of Memphis is thus given all governmental powers, there are two other municipalities, Lenox and Binghampton, duly incorporated by the state of Tennessee, and each having a full quota of officers and all the usual agencies and ⁴⁰⁷ instrumentalities of city government, and being now in the full exercise thereof.

"The above provisions, if held valid, will certainly result in serious conflict between the two municipalities above named and the city of Memphis.

"3. In section 3 of article 3 it is provided:

" 'Sec. 3. Be it further enacted, that the city, through its officers and agents, may at all reasonable times, within the city and within ten miles of the city limits, enter into and examine all dwellings, lots, yards, inclosures and buildings, cars, boats and vehicles of every description, to ascertain their condition for health, cleanliness and safety; take down and remove buildings, walls or superstructures that are or may become dangerous, or require owners to remove or put them in a safe and secure condition, at their own expense; may direct and regulate the building and maintenance of partition, parapet and fire walls, partitions, fences, ovens, smoke-

stacks, stove flues, hot-air flues, fireplaces, boilers, kettles, stovepipes, and the erection and cleaning of chimneys; shall provide for the safe construction and repair of all private or public buildings within the city; compel persons to aid in extinguishing fires, or in the preservation of property likely to be destroyed or stolen.

“ ‘And the president, whenever in his opinion a nuisance exists upon public or private property, or whenever a nuisance has been so declared by ordinance, is authorized to abate and remove such nuisance and the cause ⁴⁰⁸ thereof in a summary manner, at the cost of the owner or occupant of the premises where the nuisance or cause thereof may be, and for that purpose may enter and take possession of any premises or property where such nuisance may exist or be produced.’

“ ‘This ten-mile strip includes the two cities above mentioned and much outside territory, where there are now living probably twenty thousand people, over all whose dwellings, buildings, cars, boats, and vehicles of every description the city of Memphis is thus given absolute control, with power to destroy the same, and direct and regulate the erection or repair of their buildings, at the owner’s expense, through its officers and agents in the selection of which these outside people have no voice or vote whatever.

“ ‘Moreover, under this provision, one individual, namely, the president of the commission, is authorized, ‘whenever in his opinion a nuisance exists,’ to abate the same by a summary destruction of the property at the cost of the owner or occupants of the premises. Complainants are advised, and so charge, that this section also violates section 8 of article 1, and section 8 of article 11 of the constitution of Tennessee.

“ ‘4. In section 3 of article 1 the city of Memphis is given the power ‘to establish and maintain public schools.’

“ ‘Complainants are advised that the city government as it exists under the acts which the caption of Exhibit C purports to amend, had absolutely no authority over ⁴⁰⁹ the public schools within its limits; that said schools were under the control and authority of a separate public corporation created by the acts of 1868 and 1869, known as the ‘Board of Education of Memphis.’ Said board consists of five members elected by the people under laws entirely different and disconnected from the laws constituting the charter of Memphis.

“They are also advised that the power given the city of Memphis to establish and maintain public schools not only introduces an entirely new and vitally important subject, but one that is most dangerous and disturbing, and which, if attempted to be exercised, would inevitably result in the complete disorganization, if not destruction, of the excellent system of public schools now existing in the city of Memphis, which has, so far, been purposely kept entirely free from any interference or control of the city government.

“5. That article 5 of said act, on the subject of revenue and taxation, contains several sections vitally material to the scheme of legislation set forth in said act which are clearly in violation of several provisions of the constitution of the state of Tennessee:

“(a) Section 11 of article 5 of said act.

“(b) Sections 23 and 24 of the same article.

“These sections provide a new and different scheme or system for the assessment of the property from that provided in the general assessment act of 1903, and extend to certain corporations rights and privileges denied to the body of the people of the city of Memphis. While ⁴¹⁰ taxes on all other classes of property become delinquent on the first day of July, an exception is made in favor of taxes on shares of stock in corporations, which do not become delinquent until the 1st day of September.

“These sections violate section 8 of article 1, section 8 of article 11, and section 17 of article 2.

“Complainants are also advised that sections 46 and 51 of article 5 of said act violate section 8 of article 1 and section 8 of article 11 of the constitution.

“Complainants are further advised, and so charge, that section 7 of article 8 of said act, which releases the city of Memphis from the obligation imposed by the general law of the state to furnish security in prosecuting appeals and writs of error in any judicial proceedings, is in clear violation of section 8 of article 11, as well as section 17 of article 2 of the constitution of the state.

“Complainants are further advised and so charge that sections 14, 15 and 22 of article 8 and subsection 37 of section 1 of article 3 of said act, under which commissioners of the city are authorized to hold any election for any lawful purpose in said city, and to ascertain and declare the result thereof, introduce an entirely new subject, which is in no way referred

to in the caption of the act, and are in violation of the same provisions of the constitution last above referred to. These provisions of said act materially change the general election laws of the state, and authorize the five commissioners in control of the city to hold elections which were heretofore held by commissioners of registration under the laws applicable⁴¹¹ to the entire state. The effect of these provisions, if valid, would be to authorize said commissioners, not only to hold all special elections in said city, but also to prescribe the rules and regulations governing the elections at which their successors are to be elected, and at which they themselves might and probably would be candidates for re-election.

“Complainants are advised, and so charge, that each one of the seven matters above named constitutes an entirely new subject, not referred to directly or indirectly in, or in any way connected with or suggested by, the title of the act, Exhibit C, and that each renders said act unconstitutional, null and void.”

Other special points of unconstitutionality insisted upon are the following:

In subsection 6 of section 1 of article 3 of the act, the municipal council is given exclusive power to license ferries and to regulate the same, and the landings thereof within the limits of the city, and to fix and prescribe the charges and fees for ferries. This is objected to as unconstitutional in itself, and the introduction of a subject not covered by the caption.

In sections 37, 41, and 44 of article 5, which relate to revenue and taxation, there are several provisions which cover state and county taxes. This, it is claimed, is the introduction of a new subject.

We shall now consider the foregoing several objections.

There is no force in the contention raised in respect of the boundaries. Every municipal corporation must have⁴¹² definite boundaries, and these may be fixed by the legislature in enacting the charter, and as part thereof, and they may be subsequently changed by the same body: 1 Dillon on Municipal Corporations, 3d ed., secs. 182, 185; 1 Abbott on Municipal Corporations, secs. 55, 57, 58, 63.

We shall consider together section 3 of article 1, concerning the two-mile strip, and section 3 of article 3, concerning the ten-mile strip.

The provision upon this subject in the original taxing district act (Acts of 1879, c. 11, p. 16, sec. 3), and in the first amendment thereto (Acts of 1879, c. 84, sec. 1), the first of which acts the present caption purports to amend, was as follows: "Said government shall have the power to pass all laws to preserve the health of the taxing district; to define, prevent and remove nuisances within the taxing district; and for a distance of one mile outside of the same; to make quarantine laws and enforce the same within ten miles of the taxing district."

We are not aware that these special provisions of the acts referred to have ever been drawn in question. The acts themselves, with their several amendments, have been the subject of numerous adjudications, and, so far as questions have been made upon them, the acts have been upheld.

In *Chicago Packing and Prov. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545, an act was upheld which conferred upon cities and villages the power to regulate establishments engaged in slaughtering animals for the distance of one ⁴¹³ mile beyond their corporate limits, even if that should lap over and embrace a portion of the territory comprised in the boundaries of another municipality: 1 Dillon on Municipal Corporations, secs. 184, note 4, 3d ed., 212.

In the same volume (section 144) it is said by the author: "The general nature and scope of the authority, as it is not infrequently bestowed, are well illustrated by a case in Maryland. By its charter the city of Baltimore was vested with 'full power and authority to enact all ordinances necessary to preserve the health of the city, prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same.' Commenting on this provision of the charter, the court of appeals say: 'The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the general assembly could have exercised. Of the degree of necessity for such municipal legislation the mayor and city council of Baltimore were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of

the objects of which they were made the guardians. "To prevent the introduction ⁴¹⁴ of contagious diseases within the city, and within three miles of the same," they might impose heavy penalties on the captain, owner, or consignee of any ship or other vessel entering the port of Baltimore, on board of which smallpox or other contagious diseases might prevail; or they might seek the accomplishment of their object by causing the vessel and all persons to be taken possession of and controlled until their purification and disinfection were effected, and impose on the captain, owner or consignee the payment or reimbursement of all the expenses incurred by such proceedings; or they might adopt at the same time both suggested remedies, if for the successful and faithful execution of their powers they deemed it necessary to do so'"; citing *Harrison v. Mayor of Baltimore*, 1 Gill, 264.

In section 354 it is said: "By-laws made by municipal corporations, with respect to a liberty or franchise granted them with local jurisdiction beyond the limits of the municipality, are as binding upon the persons going into the liberty as the by-laws of the city upon those who come within its walls."

In 2 Abbott on Municipal Corporations, pages 1383, 1384, it is said: "Municipal ordinances or resolutions can have no extraterritorial force or effect, and this is true even in cases where a municipality may have acquired property outside its geographical limits. . . . It is, of course, within the power of the state legislature to authorize ⁴¹⁵ subordinate corporations to pass ordinances or laws which shall have a restricted effect beyond their limits. This has been done in some cases for the purpose of enabling a particular municipal corporation to suppress nuisances detrimental to the public health and morals."

In 1 Dillon on Municipal Corporations, section 366, however, it is said: "No implied power to pass by-laws, and no express general grant of the power, can authorize a by-law which conflicts either with a national or state constitution, or with the statute of the state, or with the general principles of the common law adopted or in force in the state."

The same author says: "It is to secure and promote the public health, safety and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within

the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such. Speaking upon this subject in a very recent case, where a city, under authority to prevent and restrain encroachments on rivers running through it, commenced summary proceedings to remove a private wharf, ⁴¹⁶ an eminent judge uses this language: 'But the mere declaration by the city council that a certain structure was an encroachment or obstruction did not make it so; nor could such declaration make it a nuisance, unless it in fact had that character. It is a doctrine not to be tolerated in this county that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities'": Section 374.

By recurring to the provisions of article 3, section 3, above quoted, it is seen that the "officers" and "agents" of the city are given the power, within the city and for the space of ten miles beyond the city limits, "to enter into and examine all dwellings" and "buildings," to ascertain their condition for health, cleanliness, and safety; to "take down and remove buildings, walls or superstructures that are, or may become, dangerous, or require owners to remove or put them in a safe and secure condition, at their own expense"; that these officers or agents "may direct and regulate the building and maintenance of partition, parapet and fire walls, partitions, fences, ovens, smokestacks, stove flues, hot-air flues, fireplaces, boilers, kettles, stovepipes, and the erection and cleaning of chimneys."

⁴¹⁷ It is observed that the following remarkable provision is added: "And the president, whenever in his opinion a nuisance exists upon public or private property, or whenever a nuisance has been so declared by ordinance, is authorized to abate and remove such nuisance and the cause thereof in a summary manner, at the cost of the owner or occupant of the premises where the nuisance or cause thereof may be, and for that purpose may enter and take possession of any prem-

ises or property where such nuisance may exist or be produced."

Of these extraordinary provisions it is to be noted that the powers of the president and of the other "officers" and agents of the city are not to be defined or controlled by ordinance. It is noted, as to the president, the power is expressly given to him to act upon his own opinion—"whenever in his opinion"—as to the existence of a nuisance upon public or private property. In section 1 of article 3 it is provided: "That all powers conferred upon the city by the charter shall be exercised by ordinance, except as otherwise provided in this charter, and the president and municipal council shall have power by ordinance, not inconsistent with the constitution and laws of this state, and subject to the limitations expressed in this charter." Then follow thirty-nine subsections, setting forth what may be done by ordinance. Next follows section 2 of the same article, concerning the apportionment of revenue annually by ordinance. After these come the extraordinary provisions which we have ⁴¹⁸ quoted and which attempt to vest in the president and the other "officers and agents" of the city unlimited and irresponsible power over the property and estates, not only of every soul in the city of Memphis, but within a radius of ten miles beyond the boundaries of the city—the power to vex and harass any and every man, or woman, or child, even, on whose property they may choose to impose burdensome restrictions; the power even to destroy the property of any citizen of Memphis, or of anyone living within ten miles of Memphis. These vast powers are not to be defined, directed or controlled by ordinance. The president and the other officers and agents of the city are themselves to decide upon these matters, and to act upon their decisions, and to impose burdens or destroy property as they may deem best; that is, upon these subjects they hold all legislative, judicial, and executive powers—that is to say, arbitrary power. Such provisions cannot be upheld in a free country. No man is wise enough or good enough to be vested with arbitrary power over the property of his fellow citizens. No body of men, composing a municipal council or other organization, is wise enough or good enough to be intrusted with such power. The provisions which give these powers are in violation of section 8 of article 1 of our state constitution, which provides: "That no man shall be taken or imprisoned, or disseised of his freehold, liberties or privileges, or outlawed,

or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment ⁴¹⁹ of his peers or the law of the land." They are therefore void.

The extraordinary and baleful character of the provisions which we have declared void is emphasized, when we compare them with the powers given upon the same general subjects in section 1, subsection 17, article 3, which are to be exercised by ordinance. In subsection 17 power is given to the municipal council by ordinance "to establish and enforce quarantine laws and regulations; to prevent the introduction and spread of contagious diseases in the city and within ten miles thereof; . . . to prohibit, remove or regulate the erection of soap factories, stockyards, slaughter-houses, pigpens, cow stables, dairies, coal oil and vitriol factories, and all other factories which the municipal council may by ordinance declare to be nuisances, within prescribed limits in the city and within two miles thereof."

In this section it is perceived that the powers conferred within the radius of ten miles beyond the boundaries of the city are for quarantine purposes simply, as in chapter 11, page 15, acts of 1879, and that the powers here conferred within the two-mile limit beyond the corporate boundaries are most of them of the special character sanctioned by the authorities for the protection of municipalities against factories dangerous to the health of a city. We do not think, however, that the legislature could constitutionally empower a city by ordinance to prohibit "pigpens, cow stables, and dairies" for two miles beyond the city limits. For the same reason we ⁴²⁰ are of the opinion that the provision contained in article 1, section 3, is void, so far as it purports to confer power beyond the city limits. That provision reads: The city "may have and exercise within the city limits, and for two miles outside thereof, all governmental powers and police powers, subject to the limitations prescribed by the constitutions and laws of the state and of the United States." The last clause, beginning with the words, "subject to the limitations," etc., means nothing, since all municipal ordinances are by their very nature, and the subordinate character of municipalities as compared with the nation and the state, subject to the limitations prescribed by the constitution and laws of the state and of the United States. The provision, with this surplusage elided, is simply that the city may have and exercise, not only within the city limits, but for two miles

outside thereof, "all governmental powers and police powers." We have seen that, *ex necessitate*, a limited police power may be granted to municipalities over a small section of country surrounding their boundaries for their protection against nuisances, and to safeguard the health of the people residing in them; but even this is hard to justify on any principle other than that the municipality is in such matters the agent of the state itself for the protection of the people of the state. But that agency cannot be used as a basis for conferring power upon municipalities over territory outside of them any further than bare necessity requires. Certain it is there can be no justification ⁴²¹ for extending over an outside strip of country, two miles in width, or of any less width, all the governmental powers of the city, or even all the police powers of the city. The delegation of such extensive power is in violation of at least two sections of the constitution. The exercise of governmental powers over the people embraced within any area or territory necessarily involves control to a very material degree over their persons and property. The control in the present instance is given, not to anyone chosen or elected by the people over whom they are to exercise dominion, but to the officers of a foreign body, chosen for the service of that body, and not for the people to be affected by the powers given. No other people of the state are so burdened, and no other city is so favored with dominion beyond its borders. The necessary effect of such legislation, if valid, would be to subject the property of the people inside of the strip referred to to the taxing power of the city of Memphis, which would result in taking their property for the use of the city, from the application of which they could derive no benefit. It would also impose upon them the whole burden of the police powers of the city, to be exercised for the benefit of the latter, and thereby would they be caused to bear a weight borne by no other people of the state. We need not consider whether the legislature would have the power to impose such burdens upon the people living near to all of the other cities and towns of the state, since such general legislation would immediately ⁴²² produce an uprising which would insure its repeal. But upon the general question we do not hesitate to say that the legislature has no more power to take the property of one man and give it to a corporation, municipal or otherwise, than it has to give his property to another citizen; and no more has it power to impose burdens

upon the citizen in favor of a municipal corporation of which he is not a member than it has to impose burdens upon him in behalf of another man who has rendered to him no equivalent. For the reasons above given, we think that the clause under examination is in violation of both article 1, section 8 of the constitution, and also of article 11, section 8.

We do not think there is any force in the objection that the act in question gives to the city the power to establish public schools within its borders. This is a matter that may be properly included within municipal powers: *Ballentine v. Mayor and Aldermen of Pulaski*, 15 Lea, 633; 1 Abbott on Municipal Corporations, p. 702; 2 Abbott on Municipal Corporations, p. 1219; 3 Abbott on Municipal Corporations, p. 2378 et seq.

Article 5 is entitled "Revenue—Taxation." Under this article sections 11, 23 and 24, also 46 and 51, are attacked as unconstitutional.

Section 11 reads as follows: "Sec. 11. Be it further enacted, that the assessor shall return, on his assessment-book of real property, in tabular form, each parcel of real estate subject to taxation, with the description and value thereof, and in separate column the value attached by the assessor to each ⁴²³ parcel or description, with the name of the owner, if known. When any property is not laid off in lots or blocks, the assessor shall describe same by any pertinent description, and for the purpose of such description he may require the owner thereof to furnish such description. It shall be the duty of all owners of property, not so laid off in lots or blocks, to furnish to the assessor a sufficient description thereof, and in case of the failure of any such owner to furnish such description at least fifteen days before the time fixed for the return of the assessment, the assessor may require the city engineer to make and return to him a survey of such property *and the expenses of such survey shall be returned by the assessor, together with his assessment of the property, and shall be added to the tax to be levied upon the property and collected as a part thereof.*"

So much of the foregoing section as is underscored or italicized violates article 2, sections 28, 29 of the state constitution, which require equality and uniformity in taxation. Section 28 provides that "all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and

uniform throughout the state." Section 29 provides that municipal taxes shall be imposed "upon the principles established in regard to state taxation." It is not sufficient merely that all persons within the city may be burdened with the additional expense referred to in the section quoted. Nowhere else in the state is this burden imposed upon taxpayers; ⁴²⁴ that is, the burden of paying the expenses of a survey made by the taxing power. The imposition of such a burden violates the general principle of uniformity and equality prescribed by the constitution, since the matter of description is not local to any city or town, but is a general requirement covering the whole state.

The next section complained of reads as follows: "Sec. 23. Be it further enacted, that if anyone against whom a personal tax is assessed, and which is due and unpaid, whether the same shall be delinquent or not, shall have removed out of the city, or shall be about to remove out of the city, or shall have removed or be about to remove his personal property out of the city, it shall be the duty of the city treasurer or tax receiver at once to proceed to collect such personal tax by distress sale of any personal property of such person that shall be found in the city of Memphis, as provided in the preceding section of this article for the distress and sale of personal property for delinquent personal taxes."

This section is in violation of article 11, section 8 of the state constitution. That section provides: "The legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of the individuals inconsistent with the general laws of the land; nor to pass any law granting to an individual or individuals rights, privileges, immunities or exemptions other than such as may be by the same law extended to any member of the ⁴²⁵ community who may be able to bring himself within the provisions of such law."

It is true that the legislature has power to grant special charters to municipal corporations, and may, in general, include within those charters such peculiar provisions, not in conflict with the constitution, as may be needed for the convenience and well-being of the particular community. But where these provisions are so general as to fall within a classification common to all the citizens of the state, there can be no justification for erecting a single city into a class by itself, with provisions more onerous than are imposed upon all other

citizens occupying the same situation, or more advantageous. It was so held many years ago, in a case cited *infra*, where the legislature attempted to exonerate the city of Memphis from the burden of executing cost or appeal bonds. By the general laws of the state, applicable to all citizens, tax officers are permitted to distrain for delinquent taxes. Nowhere else in the state are they permitted to distrain for tax not delinquent, except in the city of Memphis under the section above quoted. The said section creates an unconstitutional discrimination in favor of the city of Memphis, and thus is in violation of the section of the constitution above referred to. It imposes upon the citizens of Memphis a burden nowhere else imposed, and is in violation of article 1, section 8 of the constitution. There can be no good reason for singling out the city of Memphis for these discriminations.

⁴²⁶ The next section complained of, so far as need be quoted, reads as follows: "Section 24. Be it further enacted that if any tax, interest, or cost shall remain unpaid on the first day of September on any share or shares of stock of any corporation, the shares of which are taxable under this charter, or any ordinance of the city, it shall be the duty of the city treasurer, or tax receiver, to sell such share or shares to the highest bidder," etc.

By section 21 the first day of July is made the day of delinquency as to taxes on all other kinds of property. The constitutional objection suggested is that an unreasonable discrimination is made in favor of holders of shares of stock in corporations, by giving to these persons until the first day of September. We think this objection is well taken, and makes the section referred to (section 24) unconstitutional as in violation of article 11, section 8 of the constitution: *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, 24 Am. St. Rep. 625, 15 S. W. 87, 12 L. R. A. 70.

The next section complained of is the following: "Sec. 46. Be it further enacted that in any suit or proceeding involving or in any manner calling in question the title or right of the grantee in a tax deed, or those claiming under lien of, to, or in the real property conveyed, or purporting to be conveyed, by such tax deed, executed substantially as provided in the preceding section, the person claiming title adverse to the title conveyed or purporting to be conveyed, by such tax deed, ⁴²⁷ shall be required to prove, in order to defeat said tax deed, either that the taxes, interest and costs

were paid before the sale; that the real property therein described was not subject to taxation for the year or years stated in the deed; that the real property therein described had been redeemed from the sale at the date of the deed, or the tender of the redemption money had been made to the city treasury before the execution and delivery of the deed, in accordance with the provisions of this article, and that such redemption was had or attempted to be had for the use and benefit of the person having the right of redemption under this article; and if any person claiming title under a tax deed executed substantially as provided for in the preceding section shall be defeated in any suit or proceeding by or against him for the recovery of the real property conveyed, or purporting to be conveyed, by such tax deed, the successful claimant shall be adjudged to pay such person claiming under such tax deed the full amount of all money paid by the purchaser at the tax sale for such real property, together with interest at the rate of twelve per cent per annum; and also the amount of taxes—state, county, municipal, general, or special—paid by the purchaser, his heirs, or assigns after the date of the certificate of purchase, with the same rate of interest per annum, together with the costs of tax deed and fees for recording the same; also the total costs of all improvements made thereon, and all costs in the case, which judgment shall be a lien upon the real property in controversy, and shall ⁴²⁸ bear interest at the same rate per annum, and may be enforced by execution or sale as in other cases of judgments and decrees of such court against the land in controversy.”

Under the foregoing section, if any citizen's property has been unlawfully subjected to a tax sale, and he shall sue such unlawful holder of this property and defeat him in the litigation, he must nevertheless pay to his defeated adversary whatever price the latter may have paid at such unlawful sale; and not only this, but he must pay him twelve per cent interest per annum; and not only this, but any state, county, municipal, general or special taxes which such illegal purchaser may have paid and in addition twelve per cent on these amounts; and not only this, but the costs of the unlawful tax deed and fees for recording it; and not only this, but the total cost of all improvements which the unlawful purchaser may have made upon the property of the lawful owner; and not only this, but all the costs of the case in which he

has defeated the unlawful holder of his property. All these sums, with accumulated interest, are made a lien upon the lawful owner's property, and the same is to be subjected to sale for the exoneration of these sums imposed.

The foregoing section is unconstitutional and void, in that it creates an unreasonable discrimination in favor of the city of Memphis as a means of collecting its taxes, and also in favor of purchasers at tax sales under the authority of said city, in violation of article 11, section 8 of the constitution of the state. It is also unconstitutional ⁴²⁹ as placing an unreasonable burden upon the taxpayers of the city of Memphis, in violation of article 1, section 8 of the constitution. It is also unconstitutional as in violation of that implied restriction of the state constitution which provides that the private property of one citizen shall not be taken from him and given to another. Such a statute cannot be the law of the land: *Stratton Claimants v. Morris Claimants*, 89 Tenn. 535, 24 Am. St. Rep. 625, 15 S. W. 87, 12 L. R. A. 70. It is to be observed that the section just quoted does not limit the ground on which the claimant under the tax deed may be defeated. It is observed that the language is as general as it can be made: "If any person claiming title under a tax deed, executed substantially as provided for in the preceding section, shall be defeated in any suit or proceeding by or against him for the recovery of the real property conveyed or purporting to be conveyed, by such tax deed, the successful claimant shall be adjudged to pay such person claiming under such tax deed the full amount of all money paid by the purchaser at the tax sale for such real property, together with interest at the rate of twelve per cent per annum." Under this section the owner, the lawful owner of the property, would be onerated with the duty of making payment to the unlawful purchaser of the amount of his bid and twelve per cent interest, and of removing all of the other burdens appearing in the subsequent part of the section, even though he should defeat the claimant to his property by showing that he ⁴³⁰ himself had already paid the taxes on the property before the sale, or by proving that his property was not subject to taxation for the year or years stated in the deed; that is to say, no matter how illegal or unjust the sale may have been, the owner of the property is bound to shoulder all of the consequences arising out of the mutual

mistake of the city and the purchaser at the tax sale, and this although the lawful owner is wholly blameless.

The next section complained of reads as follows: "Sec. 51. Be it further enacted that each assessment, land tax-book, or personal tax-book, notice, advertisement, book of sale, certificate of purchase, deed, paper, and document of every nature and description, made or executed under or pursuant to this article, shall be liberally construed, to effect the purposes and objects of this article, and in determining the validity thereof. *No error or irregularity in any assessment, land tax-book, personal tax-book, notice, advertisement, book of sales, certificate of purchase, deed, paper, or document aforesaid, relating to the assessment, levy, or collection of the taxes of the city, shall in any manner affect or impair the validity of any sale or other proceeding for their collection.* This charter shall be taken and held to be a full and sufficient notice of all acts and proceedings for the assessment, levying, and collecting of the taxes of the city of Memphis."

The taxing power is necessary to the life of all governments, but there are some limits even upon a sovereign ⁴³¹ state. The assessment is the foundation of the claim of the government, whether it be of the state or of a municipality, against the citizen, of the particular amount claimed by it as taxes against him for any year. A law providing that this sum shall be due no matter what error there may be in the assessment is simply the means of placing the property of the citizen within the uncontrolled discretion of the persons who for the time being may wield the taxing power. It is therefore an instrumentality for taking the property of the citizen without due process of law, and is unconstitutional and void.

The next section complained of is section 7 of article 8. That section reads as follows: "Sec. 7. Be it further enacted that the city, in taking appeals or prosecuting a writ of error in any judicial proceeding, shall give bond as required by law, but it is hereby released from the obligation of law to furnish security therefor. Every such bond shall be executed by the president in the name of the city and under the corporate seal thereof, and shall be taken in all courts of this state as a full and complete compliance with the law in such cases."

An act of the legislature embodying the substance of the foregoing section was held unconstitutional and void, as in violation of article 11, section 8 of the constitution as far

back as the April term of this court in the year 1877: See *City of Memphis v. Fisher*, 9 Baxt. ⁴³² 239. The section above quoted must therefore be declared unconstitutional.

Objection is made to subsection 6 of section 1 of article 3. This subsection provides that the municipal council shall "have exclusive power to license ferries and to regulate the same, and the landing thereof within the limits of the city, and to fix and prescribe the charges and fees for ferries."

For the defendants it is insisted that it is customary everywhere to grant such rights to municipal corporations. Such seems to be the rule in England and in some of our states: 1 Dillon on Municipal Corporations, 3d ed., secs. 114-116. In this state, however, there is a different rule. No authority is given in the constitution for the delegation of such rights to municipal corporations. The power of delegation is to be found in article 11, section 9, which reads: "The legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs, as may be expedient." This same provision is found in the constitution of 1834, article 11, section 8. Prior to the last-mentioned constitution the power had been delegated to the county court: *Corporation of Memphis v. Overton*, 3 Yerg. 387. We do not find anything in that case or in any prior case setting forth the grounds of this grant. However, since the constitution of 1834 and of 1870 went into effect, the power to delegate has been ascribed to the section which we have quoted; or at least the power must be found to reside there: See *Guinn v. Eaves*, 117 ⁴³³ Tenn. 524, 101 S. W. 1154, and cases therein cited. The power has been delegated to the county courts of the state, and statutes have been passed regulating the right. There is no authority in the constitution for the delegation of such powers to municipal corporations. The subsection quoted is therefore unconstitutional and void.

Objection is made to subsection 37 of article 3, and to sections 14, 15 and 22 of article 8.

Subsection 37 of article 3 provides that the municipal council shall have power "to locate and establish as many voting precincts in each ward as may be necessary to accommodate the voters therein, and to guard and protect the same, provided that a sufficient number of precincts be established in each ward so that they shall conform to any rule or regulation fixed by the county court for holding state or county elections."

Subsection 14 of article 8 reads: "That all special elections, not otherwise provided for, shall be held under such regulations as may be prescribed by ordinance."

Section 15 reads: "That subject to the constitution and laws of the state governing the city, provisions may be made by ordinance for the holding of any election for any lawful purpose, and for conducting the same and ascertaining and declaring the result thereof, and making a proper record to evidence the result."

Section 22 reads: "That in all municipal elections held under this charter the voters thereat shall have all the qualifications necessary to entitle them to vote for ⁴³⁴ members of the general assembly, and must have resided for six months next preceding the election in the city of Memphis."

For the defendants it is insisted that the power delegated has reference solely to special franchise elections and not to general official elections. It is further insisted that the election law of 1897 (Acts 1897, p. 139, c. 16) construed in the case of *Gotten v. Gowen*, 113 Tenn. 175, 80 S. W. 1087, does not contemplate and make special provision for franchise elections such as are authorized by the act of March 27, 1907, under the head of franchises. It is further insisted that elections are an incidental matter and belong naturally to municipal life.

We think the learned counsel for the defendants incorrectly construe the provisions above quoted. Undoubtedly the purpose of these provisions was to place the whole matter of elections within the city of Memphis, both general and special, and of every nature, and for all purposes, in the municipal council. This is especially manifest from the language used in section 15 above quoted: "Provisions may be made by ordinance for the holding of any election for any lawful purpose, and for conducting the same, and ascertaining and declaring the result thereof, and making a proper record to evidence the result."

It is no doubt true, as insisted for the defendants, that the matter of elections is incidental to corporate life, ⁴³⁵ and under proper limitations may be conferred in a charter. But the question here goes deeper. There is a general law of the state providing how elections shall be conducted in communities having a population of fifty thousand inhabitants or over according to the federal census of 1890, or that may have

at any time thereafter fifty thousand inhabitants or over. This general statute (Acts 1897, c. 16, p. 139) applies to all elections, state, county, and municipal, within the territorial designation above indicated. By this act it is made the duty of the commissioners of registration to appoint, prior to all elections held under the provisions of the act, three judges and two clerks and the officer or officers to hold such election, "to the exclusion of the sheriffs and coroner, or other officer or person heretofore possessing said power of appointment of elections in each ward and district, and voting precinct of the city or county to which this act applies; and the county court, mayors, and boards of mayor and aldermen and sheriffs in the counties and cities within the provisions of this act are hereby divested of the authority to appoint said officers, judges and clerks of said election. All three of the judges shall not be from the same political party, if persons from different political parties are willing to serve; and they shall be appointed from the two political parties most numerously represented in such ward or district. The two clerks shall be of different political parties, if competent persons of different political parties are willing to serve. The judges and clerks shall ⁴³⁶ be residents and citizens of the ward or district in which the voting places for which they are appointed are situated. They shall be appointed within sixty days prior to the election, and in due time to serve thereat."

It is further provided in the act referred to (the act of 1897): "That it shall be the duty of the officer holding the election to deliver the polls or returns of the election sealed as received to the said commissioners of registration not later than 12 o'clock M. on the first Monday after the election. On the first Monday after the election it shall be the duty of the commissioners of registration to compare the said polls or returns at the courthouse, and to certify, in writing, signed by at least two of them, the result as shown by said polls or returns, and to deliver said certificate to each person elected at said election."

It is further provided "that said commissioners of registration shall cause a true copy of all the polls or poll lists used at or in every regular November election to be made out, and when completed they shall file the same with the clerk of the county court to be preserved as records for the period of four years by him."

In the last section of the act it is provided: "That the duties imposed and the powers conferred herein upon the commissioners of registration shall apply to all national, state, county and municipal elections, and also to all special or called elections."

The city of Memphis falls within the provisions of the foregoing act, along with many other communities in the state, which fall within the classification made by ⁴³⁷ this act. No good reason can be conceived why the city of Memphis should be elevated above the other communities covered by the act, or depressed below those communities, as the case may be, and placed in a class by itself, whereby, in the use of the elective franchise, it is relieved of the burdens imposed upon other communities by the provisions of the act referred to, and of those acts which the latter act amends, or why its people should be deprived of the safeguards vouchsafed to other communities by the said act of 1897 and its congeners. Those provisions are both burdens upon the official agencies employed in the conduct of elections and benefits and safeguards to the people of the communities for which they were devised. The attempt to deprive the city of Memphis of the benefit of these provisions must be held void as in violation of article 1, section 8 of the constitution, and of article 11, section 8.

It is insisted that the various provisions which have been above declared unconstitutional along with certain other provisions now to be mentioned, constitute distinct subjects not embraced within the title of the act we have under consideration (the act of March 27, 1907); hence the act is void, as in violation of article 2, section 17, of the constitution of the state. The other provisions referred to in connection with the foregoing provisions declared unconstitutional are sections 37, 41 and 44 of article 5, relating to revenue and taxation. These sections contain several provisions which cover state and county taxes.

⁴³⁸ Article 2, section 17, so far as necessary to be quoted at this point, and so far as applicable to the inquiry above suggested, reads as follows: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The decisions in this state construing and applying the provision of the constitution just quoted are very numerous. They are as follows: *State v. Hayes*, 116 Tenn. 40, 93 S. W. 98; *Memphis v. Hastings*, 113 Tenn. 142, 86 S. W. 609; *Ar-*

buckle Bros. v. McCutchen, 111 Tenn. 514, 77 S. W. 772; Nichols & Shepherd Co. v. Loyd, 111 Tenn. 145, 76 S. W. 911; Saunders v. Savage, 108 Tenn. 340, 67 S. W. 471; Condon v. Maloney, 108 Tenn. 82, 65 S. W. 871; Carroll v. Alsup, 107 Tenn. 257, 64 S. W. 193; State v. Town of McMinnville, 106 Tenn. 384, 61 S. W. 785; State ex rel. Burkhalter v. Banks, 106 Tenn. 394, 61 S. W. 778; State v. Hoskins, 106 Tenn. 430, 61 S. W. 781; State ex rel. Astor v. Schlitz Brewing Co., 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; State v. Brown, 103 Tenn. 449, 53 S. W. 727; State v. Bradt, 103 Tenn. 584, 53 S. W. 942; Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303; Bank v. Divine Grocery Co., 97 Tenn. 603, 37 S. W. 390; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559. The remaining cases upon the subject will be found stated, examined and compared in Hardaway v. Lilly (Tenn. Ch. App. 1898), 48 S. W. 712.

It is insisted for defendants that, notwithstanding the above-mentioned unconstitutional provisions, the ⁴³⁹ residue of the act may still be good, under the rule which holds that under some circumstances void or unconstitutional provisions of a statute may be eliminated and the residue may still stand. We have numerous cases in Tennessee upon this subject. They are: Fite v. State, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A., N. S., 520; State ex rel. Cummings v. Trewhitt, 113 Tenn. 561, 82 S. W. 480; Lindsay v. Allen, 112 Tenn. 637, 82 S. W. 171; Weaver v. Davidson County, 104 Tenn. 315, 334, 59 S. W. 1105; Jones v. Memphis, 101 Tenn. 188, 47 S. W. 138; Austin v. State, 101 Tenn. 563, 70 Am. St. Rep. 703, 48 S. W. 305, 50 L. R. A. 478; Gribble v. Wilson, 101 Tenn. 612; State ex rel. Hays v. Cummins, 99 Tenn. 682; State v. Scott, 98 Tenn. 256, 39 S. W. 1, 36 L. R. A. 461; Reelfoot etc. District v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725; Dugger v. Mechanics' & I. Ins. Co., 95 Tenn. 260, 261, 32 S. W. 5, 28 L. R. A. 796; Burkholtz v. State, 16 Lea, 71; Ballentine v. Mayor etc. of Pulaski, 15 Lea, 633, 648; Franklin County v. Railroad, 12 Lea, 521, 531, 552; State v. Wilson, 12 Lea, 246, 254; Tillman v. Cocke, 9 Baxt. 429; Neely v. State, 4 Baxt. 174.

We shall postpone the determination of the questions thus suggested until we state the next phase of the inquiry in respect of the violation of article 2, section 17 of the constitution. That portion of section 17 of article 2 of the con-

stitution involved in this latter phase reads as follows: "All acts which repeal, revive or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended."

⁴⁴⁰ The title of the act under consideration is as follows: "An act to modify and change in certain respects the form of government of the city of Memphis by abolishing certain municipal officers, departments and agencies, and creating others; to alter and change some of its powers and to create others; to amend its existing charter or charters, or acts of the general assembly, under which it is organized and exists as a municipality, so as to continue its existence, with a more efficient form of government, and with powers altered and enlarged, so as to secure and promote better government and administration, and to amend an act entitled 'An act to establish taxing districts in the state and to provide the means of local government for the same,' being chapter 11, acts of 1879, and all acts amendatory thereof; and also to amend chapter 54 of the acts of 1905, entitled 'A bill to be entitled "An act to establish taxing districts in this state, and to provide the means of local government for the same,"' the same being chapter 11 of the acts of 1879, and all acts amendatory thereof, constituting the charter of the city of Memphis; and to better and perfect the charter of said city of Memphis, created by the acts of assembly aforesaid."

Before entering into the particulars of the question, we shall state in outline the general contentions of the respective parties. For the complainants it is insisted that, while the caption purports an amendment, the body of the act shows a complete new scheme of legislation, covering the whole subject, and thereby displacing ⁴⁴¹ the former acts composing the charter of the city of Memphis; in short, that, while the title purports simply an amendment of the former charter, the body of the act contains a new charter, and is therefore in conflict with the caption, and consequently makes the whole act void. For the defendants it is insisted that the amendatory purpose not only appears in the caption, but in the preamble following the caption, and also in the body of the act, all through it; hence that the body of the act is in strict accord with the caption.

There are some general observations that we deem pertinent at this point, in the nature of a statement of the principles which should control the investigation.

In the first place, while the legislative history of an act may be looked to as throwing light upon its meaning and purpose, we do not think that any controlling importance can be attached to the fact that the bill in question was first introduced as an independent act, and then withdrawn and introduced as an amendatory act, for the purpose of avoiding the Pendleton law, and escaping the prohibition of the sale of intoxicating liquors in the city of Memphis. The purpose, whether laudable or reprehensible from a moral, social or economic standpoint, was at all events a lawful one, and cannot greatly affect the question whether the act under examination can be considered and treated from the constitutional standpoint as an amendatory one.

In the second place, we deem it quite true that if the caption of an act shows that it was intended by the legislature ⁴⁴² as an amendatory act, while the body shows it, in direct terms, or express terms, to be a repealing act, such act must be held void under the doctrine of *Murphy v. State*, 9 Lea, 373. If the caption of the act be of the kind referred to, and the body shows that it is a complete scheme of legislation intended to cover the whole field, here we would find, in the body of the act, what is commonly known as a "repeal by implication," and the question to be determined would be presented in an alternative aspect: First, either the whole act would be void; or, secondly, it would be good simply as a new and independent act. The solution of the alternative depends upon the construction and application of article 2, section 17 of the constitution, above quoted. Now, suppose the legislature, because not rightly comprehending the constitutional effect of what they are doing, place under a title purporting to amend a given statute matter which by construction of law is held to be an implied repeal of the law referred to; shall that render the act abortive? The purpose of the last clause of the constitutional provision above quoted is fully met in the case supposed by the recital of the act, to be dealt with afterward, in the caption, and attention is thereby called to it. But is the public not misled and deceived when the purpose expressed in the caption is to amend the act referred to, while the actual thing effected in the body of the act, if its provisions be given a true interpretation, is a repeal of the prior legislation? It would seem so, and ⁴⁴³ thereby it would appear that the purpose of the prior clause of the constitution quoted—"No

bill shall become a law which embraces more than one subject, that subject to be expressed in the title"—would be violated, since the true subject of the act would not be expressed in the title; that true subject, as expressed in the body of the act, being a repeal of the former statute, while the subject expressed in the title is an amendment.

We do not think the opinion of the legislature as to whether an act is an amendatory act, or a repealing act, is at all conclusive. The question is a judicial one, and it is the duty of the court to consider it from that standpoint alone, without further deference to the opinion of the legislature than is required by the well-known and universal rule that statutes must not be declared unconstitutional if it be possible by any reasonable construction to hold them valid; or, as applied to the case supposed, when the caption declares a purpose to amend an act referred to, the act must be sustained as an amendatory act, if this can be done by any reasonable construction. But suppose the "expressed intention," or that expressed in terms, is in conflict with the completed result as shown by the provisions of the act, which shall control? When the actual provisions show a repeal of prior acts, can the legislature nullify the fact by saying in terms, "This is an amendment, not a repeal"? Certainly not. The dominant intent must be held to be that which is shown by the fact. This is unmistakable. The other is illusory. Here we must distinguish ⁴⁴⁴ between purpose and characterization. To determine the purpose we examine both the title and the body of the act. If they are found to be at cross-purposes—that is to say, if the title expresses one purpose and the body of the act shows a different one, the latter is not included in the former—there is a conflict, and a violation of the constitution. The body of the act always shows the real thing done, the thing actually intended. It gives character to the act. By it we are to determine the designation or class under which the act falls; and this, as above stated, is a matter for judicial construction and determination.

We do not think that *Poe v. State*, 85 Tenn. 495, 3 S. W. 658, is at all opposed to the views above expressed, since it appears (page 500 of 85 Tenn., page 659 of 3 S. W.), that the court simply rejected as surplusage so much of the title of the act under examination in that case as referred to the matter of amendment, no particular statute being referred to, and held that the title of the act showed "an intent to

legislate upon the entire subject of concealed weapons, and not a purpose to amend or repeal a particular provision only." It was thus treated as an independent act, covering the whole subject, and repealing by implication prior laws in conflict with it. However, if the matter rejected from the title in *Poe v. State* had not been rejected, the act there under examination must have been held unconstitutional, as shown by the later case of *Shelton v. State*, 96 Tenn. 521, 32 S. W. 967.

⁴⁴⁵ Nor is there any doubt under our decisions that, if the subsequent act contains a full scheme of legislation upon the subject which it covers, it operates as a repeal of prior acts on the same subject (*Erwin v. State*, 116 Tenn. 71, 93 S. W. 73), and there is no place for the theory advanced by defendants' counsel that after such repeal there is still left in the former corporation a spark of life, or that it is still a legal entity under its former incorporation, and is merely fanned into a larger life by the subsequent legislation. The result of the repeal of the charter, where there is in fact a repeal, is a complete legal extinction; there is no legal entity left: *Erwin v. State*, 116 Tenn. 71 et seq., 93 S. W. 73; *Brinkley v. State*, 108 Tenn. 475, 67 S. W. 796. In the latter case it was said: "A municipal charter is not only the measure of corporate powers, but is also the beginning and the end of corporate life; and that life is a distinct, indivisible thing. When a charter is completely granted, a distinct corporate entity comes into being; and when the charter is completely surrendered, the corporate entity ceases to exist. So the life of the old town of McMinnville, as a distinct legal entity, began when the old charter was granted, and the life of that town ceased when that charter was surrendered. The change was not a mere amendment of the old charter, a simple transmutation of the existing corporate entity, but an entirely different thing. The legal result was twofold: (1) There was an absolute extinguishment of one corporate entity, and (2) the original ⁴⁴⁶ establishment of another one. Although subject to the contracts of the old corporation (Acts 1875, p. 143, c. 92, sec. 14, proviso), this new charter was, in contemplation of law, the inception of a new municipality, the beginning of a new and distinct corporate existence; and, having been incorporated after the passage of the act of 1899 (Acts 1899, p. 474, c. 221) with a population of only nineteen hundred and eighty by the federal census of 1890, this new municipality was from the start subject to the pro-

visions of the four-mile law as amended by that act." There is nothing in *Cooper v. Town of Shelbyville* (Tenn. Ch. App.), 57 S. W. 429, in conflict with what has just been said. On the contrary, that case is in full accord. (See, specially, pages 434 and 442.)

We may add that the following quotation, appearing in the brief of defendants' counsel, taken from Thompson's *Commentaries on the Law of Corporations* (volume 1, section 623), is good law, viz.: "The test by which to determine whether a particular subject can be embraced within the title, 'An act to amend' a former act, is to consider whether the subject could have been embraced within the original act under its title. If, under the original title of the act incorporating the company, it would have been proper to confer upon the corporation the powers contained in the amendment, then there can be no doubt of the power to confer them upon it by way of amendment of such act, and under the title of 'An act to amend' the original act, reciting its title. Any additional powers may be given to the ⁴⁴⁷ company under an amendatory act which could have been constitutionally conferred under the original act." This is substantially the rule laid down in our own state: *Wright v. Cunningham*, 115 Tenn. 445, 91 S. W. 293; *Hyman v. State*, 87 Tenn. 109, 9 S. W. 372, 1 L. R. A. 497; *Goodbar v. Memphis*, 113 Tenn. 20, 81 S. W. 1061. This rule, however, is wholly aside from the question whether, under a caption to amend a prior act, a complete scheme of legislation may be set up which takes the place of the prior legislation. The inaccuracy of thought, it seems to us, in citing the rule referred to arises from confusing the rules applying to amendments purely with that rule which declares that a complete new scheme of legislation does not amend an old act upon the same subject, but displaces and repeals it. Similarly, the doctrine referred to by defendants' counsel, that repeals and amendments by implication do not fall within the provisions of article 2, section 17 of the constitution, simply means that they may be effective without referring to the prior act or acts incidentally affected; that is, they are independent acts with collateral effects. This is a different question altogether from the one whether an act purporting on its face to be an amendatory act can in its body be a repealing act, either by direct words or by implication.

We shall now state in outline the powers and form of organization devolved upon the city by the act in question. We cannot give these in detail, because of the ⁴⁴⁸ great length of the act, covering, as it does, seventy-five long, closely printed pages.

The powers given are: "To have perpetual succession; to sue and be sued; to implead and be impleaded, defend and be defended, in any courts of law or equity in all actions whatsoever, except as hereafter provided in article —, section 28 of this act; and that it may make and use a corporate seal, and alter same at pleasure, may acquire and hold any gift, devise, purchase or by condemnation proceedings, lands or other property for public use, either within the corporate boundaries of said city, or beyond the limits of said city, for waterworks to supply the city and its inhabitants with water; for gasworks and other works and plants for supplying the city and its inhabitants with light, heat and power, or any of them; for public parks, cemeteries, penal and charitable institutions or any of them; for hospitals, markets, wharves, engine-houses, fire stations, depots, rights of way for sewers, conduits, pipe-lines, pole lines, viaducts, bridges, tunnels, subways or for the exercise of the powers herein granted, and that hereafter may be granted, or for any other public purpose.

"That it may take, hold, use and improve any property, real, personal or mixed, either within or without the city limits that may be acquired by purchase, gift, devise, bequest or otherwise, and for any charitable use or educational, benevolent or public purpose whatsoever, and may do all that is necessary to carry out the purpose ⁴⁴⁹ of such gifts, bequests or devises, and may sell, lease or otherwise dispose of any property, real, personal or mixed of the city, and any contract rights of the city, subject to the restrictions imposed by this charter or the constitution of the state;

"That it may lay out, open, extend, widen, improve, maintain or vacate streets and alleys, sidewalks and crossings and all public highways, and regulate the use of same;

"That it may construct and maintain sewers, drains and all works necessary for the disposition of sewage;

"That it may erect, construct and maintain public buildings and public works, and may lay out and maintain public parks and cemeteries;

“That it may establish and maintain public schools, public libraries, reading-rooms and penal and charitable institutions;

“That it may exercise the powers of eminent domain and taxation, and may by amendment of this charter extend its limits as defined herein so as to include new and additional territory;

“That it may protect the property of the city, and the lives and property of its inhabitants from floods and inundations and the danger thereof; and

“That it may exercise all municipal power necessary, or which may be deemed expedient for the complete and efficient management and control of the municipal property and administration of the municipal government and necessary to maintain the public peace, protect ⁴⁵⁰ property and promote the public welfare and preserve the health of the inhabitants of the city, whether such powers be expressly enumerated herein or not; and may have and exercise within the city limits, and for two miles outside thereof, all governmental powers, and police powers, subject to the limitations prescribed by the constitution and laws of the state and of the United States.”

The foregoing provisions are contained in article 1 of the act.

Article 2 vests the legislative functions of the city in the municipal council, to consist of a president, vice-president, and three commissioners, and prescribes their qualifications and fixes their salary, prescribes what a quorum shall be, that the vote of a majority shall be necessary to pass ordinances, and indicates certain disqualifications to deal with the city in any other capacity, and contains provisions with respect to the meetings of the council.

Article 3 provides that all powers “conferred upon the city by the charter shall be exercised by ordinance, except as otherwise provided in this charter.” It further provides that the president and municipal council shall have power by ordinance to provide for the management and control of the finances and of all the property belonging to the city, and to appropriate money and provide for the payment of all debts and expenses of the city, to acquire property for the city by purchase or gift, to sell property for the city, to make contracts, to levy taxes, to license occupations and impose taxes thereon ⁴⁵¹ (specifying several hundred). Following

the list of occupations and businesses occurs this general clause: "The foregoing enumerations of powers shall be construed as in explanation and not in limitation of the general powers herein granted, and the municipal council shall have power to license, tax and regulate all trades, professions, pursuits or employments not hereinbefore enumerated, of whatever name or character, like or unlike, and fix the amount of license tax to be paid thereon."

The act then proceeds to specify the powers to license, tax, and regulate hackmen, draymen, etc., and to license and regulate ferries; and to prescribe the time for which the licenses shall run and the fee to be charged therefor. It then gives power to remove and prevent all obstructions in the Mississippi and Wolf rivers within the city, and to improve and preserve the navigation thereof, and to erect, repair and regulate wharves and docks, and to regulate the rates of wharfage within the limits of the city. It then specifies the power to provide the city with water, to make, regulate, and establish public wells, pumps, cisterns, hydrants, and reservoirs in or under the streets, within the city or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants, and to prevent the unnecessary waste of water. It next specifies the power to provide for lighting the streets and erecting lamps thereon, and to regulate and fix the price and quality of gas, gasoline, ⁴⁵² electricity, or other means of lighting, and the manner and means of lighting by electricity, and the power thereof, and to compel any gas or electric light company, corporation, or individual to change and relocate any gas mains and pipes, or any poles or conduits for electric wires.

Then follow in due order full provisions with respect to streets, sewers, steam railroads, bridges, culverts, public buildings, inspection of food, inspection of weights and measures, and numerous classes of merchandise; provisions concerning the public health and public morals, theaters, and places of public amusement; the establishment of fire limits, and the prevention and removal of public nuisances; provisions for the preservation of public order, public safety, and public convenience, and the establishment of prisons and charitable institutions.

Power is also given "to establish the salaries and duties of all officers and the compensation and duties of all employes in all cases not provided for in this charter." Then follows

this general clause: "The foregoing enumeration of particular powers granted to the municipal council in this charter shall not be construed to impair any general grant of powers herein, or in this charter contained, nor to limit any such general grant of powers of the same class or classes as those enumerated; and the municipal council shall have power to pass, publish and amend and repeal all such ordinances, rules and regulations not inconsistent with the provisions ⁴⁵³ of this charter or contrary to the laws of this state or of the United States as it may deem expedient or necessary in maintaining the peace, order or good government, health and welfare of the city, its trade, commerce, manufactures or that may be necessary or proper to carry into effect the provisions of this charter."

Next the municipal council is given power to impose and collect fines, forfeitures and penalties. It is required to make out a budget for each department as far as may be practicable. Provisions are also made concerning the style of ordinances and the method of their passage, together with the amending, reviving and filing of ordinances. Power is also given to impose duties upon abutting property owners in respect to sidewalks and streets fronting or adjoining their property.

Article 4 prescribes the duties of the president and vice-president, and gives the municipal council "power to appoint all city officers not designated by this charter to be elected by the people or otherwise elected or appointed, and to fill by appointment all vacancies occurring in such offices; also for just cause to suspend and remove the incumbents of any such office."

This article provides for a city clerk, city assessor, judge of the corporation court, clerk of that court, comptroller of the city treasurer, city counselor, assistant city counselor, stenographer for the city counselor, city clerk, and prescribes the duties of each.

Section 26 of this article provides "that all appointed officers whose positions are created by charter or ordinance, ⁴⁵⁴ not appointed by the governor or elected by the people, shall hold their offices and continue in the service of the city, subject to the will and pleasure of the council."

Article 5 is entitled "Revenue—Taxation," and contains fifty-five sections, embracing numerous and minute provisions upon these subjects.

Article 6 is entitled "Franchises," and contains full provisions upon this subject.

Article 7 is entitled "Department of Parks and Boulevards," and contains minute provisions upon these subjects.

Article 8 is entitled "Miscellaneous Provisions." Herein are found directions concerning city improvements, fire patrol and salvage corps, official bonds, further provisions with regard to ordinances, and provisions with regard to city elections.

With regard to ordinances the following occurs in section 18: "That the municipal council shall have the power to pass all ordinances not inconsistent with this charter or the constitution and laws of the state, which it may deem necessary or expedient to more fully carry out any provisions in this charter contained."

The next section reads: "That this charter is declared to be a public act, and may be read in evidence in all courts of this state without proof."

The following sections of article 8 are referred to by counsel for complainants as being without meaning, unless the purpose of the legislature was to create ⁴⁵⁵ a new charter, and unless the act was understood by that body to be really a new charter for the city. These provisions are as follows:

"Section 1. Be it further enacted, that all ordinances, regulations and resolutions in force at the time this charter takes effect, and not inconsistent therewith, shall remain and continue in force until altered, modified or repealed by the municipal council.

"Sec. 2. Be it further enacted, that all measures and proceedings pending or under consideration in the legislative council at the time this charter takes effect, and not inconsistent with the provisions thereof, shall remain unaffected by this charter, and may be acted upon and disposed of as if they had originated under this charter.

"Sec. 3. Be it further enacted, that all rights of action, fines, penalties, and forfeitures accrued to the city before this charter takes effect, shall remain unaffected thereby and may be prosecuted and recovered in every respect as fully as if this charter had not taken effect."

"Sec. 5. Be it further enacted, that all recognizances, obligations, and all other instruments entered into or executed by or to the city before this charter takes effect, and all taxes, fines, forfeitures and penalties due or owing to the city, and

all writs, prosecutions, actions and causes of action, except as herein otherwise provided, shall continue and remain unaffected by this charter."

"Sec. 21. Be it further enacted, that the privilege taxes as now fixed by law shall remain and continue ⁴⁵⁶ until changed by ordinance, and the municipal council may from time to time, by ordinance, fix all taxes or privileges."

The following sections of article 8 are also specially referred to:

"Sec. 8. Be it further enacted, that all offices existing under the act entitled 'An act to establish taxing districts in this state, and to provide the means of local government for the same,' being chapter 11 of the acts of 1879, and all the acts amendatory thereof, constituting the charter of the city of Memphis, are hereby vacated and abolished."

"Sec. 24. Be it further enacted, that all offices created by chapter 54 of the acts of assembly of 1905, be, and they are hereby, abolished and vacated, and the present occupants or incumbents thereof shall cease to exercise the powers, duties and functions thereof, or exercise any authority or perform any duties whatsoever as officers of said municipal corporation; that the municipal council shall, as soon as practicable, organize all new departments created by this act or by the municipal council under the authority of the charter of the city of Memphis, and reorganize all other departments of the city government, and to that end all offices in each and every department heretofore created and existing are hereby made vacant, and the said municipal council shall make appointments to fill said vacancies, and shall make appointments to fill the departments of said government."

It is insisted for complainants that the foregoing ⁴⁵⁷ shows a complete, independent scheme of legislation, creating a new charter for the city of Memphis, with a full corps of officers, sufficient to support the new framework and with power in these officers to appoint all others that may from time to time be needed; that under sections 8 and 24, above quoted, of article 8 all of the offices existing under the former charter were abolished; and that sections 1, 2, 3, 5, and 21 of article 8 were wholly unnecessary and wholly unmeaning unless a new charter was intended, and if this was the intention that these sections were pertinent and proper. It is also pointed out that the act speaks of itself more than fifty times as "this charter," and contains numerous expressions, such as "when

this charter shall go into effect." It is also urged that the frame of government under the present act is antagonistic to that created under chapter 11, page 15, of the acts of 1879, and its amendments; that under the act of 1879 the municipal government was divided into legislative, executive, and judicial departments, and a system of checks and balances was provided; that the legislative department consisted of two branches or boards, and no contract could be entered into by the city of Memphis without the consent of a majority of each of said boards; and that the power of taxation was limited; that the new act is radically different, for that, instead of separate legislative and executive departments, with a system of checks and balances and limitations of the taxing power provided by the former acts, the new act vests in five ⁴⁵⁸ commissioners, or rather a majority thereof, all legislative, executive, taxing and police powers; that under the old acts the legislative department consisted of two chambers, while under this act there is only one chamber—a commission, clothed with unlimited power; that under the old act and the amendments thereto the mayor and the board of fire and police commissioners and the board of public works constituted the government, while under the new act the various departments are divided up among the commissioners, each of the five being authorized to acquire control of one department; that under the old law a certain amount was required to be apportioned to each department, which was restricted to the amount so set apart to it, while under the new act there is no such wise restriction, but the matter is left to the discretion of the five commissioners; that under the former acts the officials were placed under heavy bonds for the faithful performance of their duties, but under the new act, while bonds are required for some officers, none are required to be given by the commissioners; that under the old law the number of officers was designated and their salaries fixed, while under the new act the commissioners have power to establish offices and agencies of government without limit, and to fix their salaries; that under the old law the discharge of officers and employes was regulated by special provisions, while under the new act the power to discharge, even without a hearing, is unrestricted; that under the old act the ⁴⁵⁹ assessment of taxes was governed by conservative rules to protect the citizens, and a limit was set beyond which the city could not go, while under the new act the commissioners, who are under

no bonds, are given absolute power over all assessments, and there is no limit whatever to the amount which can be levied in the way of special taxes; that under the old act the city could exercise police power for sanitary purposes within a narrow area outside of the corporate limits of the city, while the new act confers on the commissioners all governmental as well as police powers for two miles outside of the city limits, and they may exercise certain police powers for ten miles beyond the city.

It is insisted that there is thus made to appear a very radical difference, not only between the two forms of government, but also in the nature, extent and distribution of the powers of municipal government; that they cannot be united into one consistent whole; that there is an irreconcilable repugnancy; that the new act contains provisions which are absolutely destructive of the old form of government.

For the defendants it is insisted that the language of the new act shows that it is an amendatory and not an original act; that the form of government is not substantially different from that which existed under the old acts; that under both acts, the old and the new, the government was and is one by commissioners; that originally the form of government was one-chambered, and was subsequently made two-chambered or bi-cameral ⁴⁶⁰ by chapter 54, page 99, of the acts of 1905; that the present act goes back to the original idea; that the city itself had under the former act substantially the same powers as those embraced in the present act, save the delegating of such additional powers as modern and progressive municipalities possess; that the provisions upon the subject of revenue and taxation, franchises, parks and boulevards are all embraced within the original acts and their amendments, the present act simply providing broader regulations and stronger safeguards; that it is a misconstruction of the act to say that it expressly abolishes every office, agency and instrumentality of the government existing under the former acts which it purported to amend; that it did not abolish the board of health, a separate and distinct instrumentality and agency of government; that it did not abolish the water department, the engineering department, the park and boulevard department, and the street commissioners' department; that the abolishment of all the offices would not abolish these departments; that provision is made in section 24 for the reorganization of these departments.

It is true, as insisted by defendants' counsel, that under the original act the legislative body was single, although it was composed of the members who made up the board of fire and police commissioners and the board of public works, and that the change from one to two chambers was made by chapter 54, page 99 of the acts of 1905. The other statements, however, made by complainants' ⁴⁶¹ counsel as to the difference between the two systems of government, are substantially correct. However, we do not think this feature of the case is very material; there are both correspondencies and divergencies.

We do not see, however, the force of the contention, offered by defendants' counsel, that the several departments referred to by them as existing can be said really to exist, otherwise than as abstractions, if all the offices formerly existing under the act of 1879 and its amendments are abolished. There may be a department of government without an officer filling it; but there must be an office, or function attached to it, to be filled by one or more persons on whom its duties and responsibilities may be devolved. The office or function is a concrete expression of the potential activities of the department. If there be such an office without an incumbent, this is a case of vacancy to be filled by appointment or election; but if there is no office at all the supposed department is a mere inert ideality, simply a form of words, a thing without substance.

The theory suggested in the chancellor's opinion filed as a part of defendant's brief that section 24 of article 8 merely abolished the officers, leaving the offices standing, is wholly inadmissible. An office is a species of property, and the legislature cannot constitutionally legislate an officer out of that property while leaving the office with its duties unimpaired. This would be taking the property of the citizen without due process ⁴⁶² of law, in violation of article 1, section 8 of the constitution. The legislature can, indeed, abolish any office, if there be no constitutional restriction in the way, and thereby abrogate the duties attached, and as an incident thereto the rights of the officer cease, since there is nothing to which they can attach. But, as already stated, it cannot leave the office standing and abolish the officer. His property interest consists in his right to discharge the duties of the office and to take its emoluments so long as the office exists and the term continues. Of course, where under the terms of the grant the officer is removable at pleasure, a

different result follows; but this feature does not occur in respect of the officers referred to in sections 8 and 24 of article 8 of the act of March 27, 1907.

Looking back over the provisions of the act of 1907, it seems difficult to reach any other conclusion than that it was intended as a complete scheme of legislation, covering the whole ground; that the body of it shows all through that it was intended as a new charter; that for this reason it is spoken of therein more than fifty times as a charter; and for the same reason that in sections 1, 2, 3, 5, and 21 of article 8 special provisions were made for the preservation of ordinances, proceedings and rights that would perish with a new charter, if not preserved by special provisions.

The inferences to be thus drawn are opposed by the language of the caption, by the preamble, and by some amendatory words appearing in section 1 of article 1.

⁴⁶³ But, as we have already said, when the body of the act discloses a different purpose from the caption, there is a variance; and it is held the body may be examined to ascertain whether it discloses an independent scheme of legislation, as contradistinguished from the amendatory purpose disclosed in the caption.

A similar question of construction was presented in the case of *Murphy v. Utter*, 186 U. S. 104, 22 Sup. Ct. Rep. 776, 46 L. ed. 1070. In that case it appeared that on June 25, 1890, Congress passed an act providing that a certain funding act of the territory of Arizona "be, and is hereby, amended, so as to read as follows; and that as amended, the same is hereby approved and confirmed, subject to future territorial legislation." Considering the matter thus presented, the court said:

"The first question to be considered is as to the relation of these two acts. Is the act of Congress to be considered as an amendment or a repeal of the territorial act? It is true the preamble speaks of the territorial act as being amended, and, as amended, approved and confirmed. But the language is not that of an amending act, but that of a repealed and substituted act. No attention is called to the amendments, which are not even introduced in brackets, and a careful reading and comparison of the two acts are required to discover where and how the territorial act is amended. It stands as an original piece of legislation, although its different sections contain the numbers taken from the revised statutes of

Arizona, as well as from the ⁴⁶⁴ original act of 1887. Both acts are complete in themselves and each is, upon its face, independent of the other. It is impossible to say that, if the territorial act were repealed, the act of Congress passed three years later would also fail in consequence thereof, because the latter is not only the later, but the paramount, act. They must either stand together as two independent pieces of legislation, or the general, and perhaps the sounder, rule stated in *United States v. Tynen*, 11 Wall. (U. S.) 88, 20 L. ed. 153, be applied, that where there are two acts on the same subject, and the latter embraces all the provisions of the first, and also a new provision, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first. In that case the defendant was indicted under an act passed in 1813 for uttering and counterfeiting a certificate of citizenship, purporting to have been issued by a California court. Upon a demurrer being filed to the indictment the judges differed in opinion, and the case was sent to this court upon a certificate of division. While pending here, in 1870, Congress passed another act embracing the whole subject of fraud against the naturalization laws, including all the acts mentioned in the law of 1813 and many others. It was held that the act of 1870 operated as a repeal of the act of 1813, and that all criminal proceedings taken under the former act failed, and that, even where two acts are not, in express terms, repugnant, yet if the latter covers the whole subject of the ⁴⁶⁵ first, and embraces new provisions plainly showing that it was intended to be a substitute for the first act, it will operate as a repeal of that act."

In the present case we are of the opinion that the body of the act purports a new charter for the city of Memphis, covers the whole subject, and therefore really purports a repeal of the prior charter; that the caption of the act and the body of it are in conflict; that the body of the act does not fall within the caption; that the act is therefore in violation of article 2, section 17 of the constitution, and is void.

The same conclusion is reached when we consider the case from the standpoint of the several provisions of the act found to be unconstitutional. The question is here presented in a double aspect. The first inquiry is whether the residue of an act can be held good after one or more sections or provisions have been elided as unconstitutional; and, secondly, whether such elided provisions present subjects not contained within

the title, and hence rendering the act void as being in violation of article 2 of section 17 of the constitution.

In 1 Lewis' Sutherland on Statutory Construction, page 583, it is said: "In determining whether part of an act can stand where another part has been held unconstitutional, a different rule as to presumptions is recognized from that which obtains where the whole act is to be considered. The general rule that legislative acts are primarily presumed to be constitutional, and that all ⁴⁶⁶ intendments are to be made in favor of the act that will give it effect according to the intent of the law-making power, does not apply in such cases, as the upholding of part of an act is not favored; and where a part has been held unconstitutional, and the remaining portion comes up for consideration as to whether it can stand as an independent proposition, the presumptions are generally against it, and it will not be sustained unless that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected."

The portions of the act of March 27, 1907, which have been rejected as in themselves unconstitutional, are not so merely incidental and subordinate that they can be stricken out without in any sense impairing the efficiency of the act (State ex rel. Cummings v. Trewhitt, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A., N. S., 520), and they are so numerous that we cannot say that the legislature would have passed the act with these left out. The act must therefore likewise fall upon this ground, without regard to the question whether any of the excluded provisions referred to present subjects not embraced in the title. It is clear, however, that one of the subjects embraced within an excluded section includes matter not falling within the title; that is, one including state and county revenue, which is a subject that could not properly be embraced under a title purporting to legislate for a city: Mayor and Aldermen of Knoxville v. Lewis, 12 Lea, 180. The section upon ⁴⁶⁷ the subject of ferries also presents a matter not within the title; likewise, the extraordinary personal powers given the president or mayor within the radius of ten miles beyond the city limits.

Before closing the opinion we wish to recur to a subject briefly touched upon on a preceding page; that is, upon the supposed power of the legislature to remove officers of a municipality without abolishing their offices.

In the case of *Memphis v. Woodward*, 12 Heisk. 499, 501, 27 Am. Rep. 750, the case of *Wammack v. Hollaway*, 2 Ala. 33, was cited approvingly, wherein it was said: "An office is as much a species of property as anything which is capable of being held or owned, and to deprive one of it, or unjustly withhold it, is an injury which the law can redress in a manner as ample as it can any other wrong." In the same case the chief justice said: "The right to exercise a public office is a species of property, equally with any other thing capable of possession, and the law affords adequate redress when the enjoyment of it is wrongfully prevented: 3 Kent, 454; *Wammack v. Hollaway*, 2 Ala., N. S., 31. The same doctrine is recognized in *Dodd v. Weaver*, 2 Sneed, 670. But the right to the office does not entitle the officer to the compensation as under a contract. He takes it subject to the authority of the creating power to modify the compensation or to discontinue the office: *Haynes v. State*, 3 Humph. 480, 39 Am. Dec. 189; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677. With this qualification ⁴⁶⁸ the officer is entitled to the office, and to its emoluments, and to redress for interference with his rights."

In *Dodd v. Weaver*, 2 Sneed, 670, the court said: "An office is an incorporeal right, and consists in the right to execute a public trust, and to take the emoluments belonging to it." In *Moore v. Sharp*, 98 Tenn. 68, 38 S. W. 411, it was said: "As to the nature of the subject in contest, the office is an incorporeal right, and it consists in the right to execute a public trust, and to take the emoluments belonging to it: 3 Kent's Commentaries, 362. Now, if the county court erroneously decided against the person entitled to the office, it was an injury to a private right for which there ought to be a remedy." In *Nelson v. Sneed*, 112 Tenn. 36, 83 S. W. 786, it is said: "The right to hold an office and receive and enjoy its emoluments, and exercise its functions is an incorporeal right." In *Maloney v. Collier*, 112 Tenn. 78, 83 S. W. 667, it is said: "An office is an incorporeal right, and consists in the right to execute a public trust and to take the emoluments belonging to it, and an injury to this right is an injury to a private right for which there ought to be a remedy."

In the case of *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677, cited in the case of *Memphis v. Woodward*, 12 Heisk. 499, 501, 27 Am. Rep. 750, after admitting that the legislature might abolish offices or reduce emoluments, the court

continued: "Yet it is quite a different proposition that, although the office be continued, the officer may be discharged ⁴⁶⁶ at pleasure and his office given to another. The office may also be abolished, because the legislature esteem it unnecessary. The common weal is promoted by that law; at least, it is the apparent object, and must be deemed to be the real one. But while the office remains, it is not possible that the public interest can be concerned in the question who performs the services incident to it. The sole concern of the community is that they should be performed, and well performed, by somebody. That they should be done by one particular person more than by another is not, therefore, a matter of expediency in any sense; and hence it cannot be the subject of legislation that one man, who has the faith of the public pledged to him that he should have the employment for a certain term, and who has, upon that faith, entered upon the employment and faithfully executed it, should be deprived of it, and supplanted by another man, who is to do, and can do, the community no other services than those already in the course of performance by the former."

The conclusion that an office could not be taken from one man and given to another by legislation was based upon the ground that this would be a judicial determination. The court said: "It does not follow, therefore, that because the British parliament, whose supremacy is acknowledged, decides questions of private rights and puts that decision, as it does its other determinations, in the form of a statute, that whatever it does is legislative in its nature. It ⁴⁷⁰ can adjudicate, and often does substantially adjudicate, when it professes to enact new laws. That faculty is expressly denied to our legislature, as much as legislation is denied to our judiciary. Whenever an act of the assembly, therefore, is a decision of titles between individuals or classes of individuals, although it may purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right, which is not a legislative, but a judicial, function. It may not be easy to distinguish these powers, and to define each, so that an act shall be seen at once to be referable to the one or the other. But I think that where a right of property is acknowledged to have been in one person at one time, and is held to cease in him and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is by sentence. If the act of 1832 had

been confined in its terms to the clerkship of Lincoln, its judicial character would be obvious. If it had said that Mr. Henderson had forfeited his office, or had conveyed it to Mr. Hoke, or that after forfeiture Mr. Hoke had been duly appointed, or had been elected by the citizens and was appointed by the legislature, it would be plainly, as respects Mr. Henderson's title, an adjudication against it, although the subsequent investment of the title in Mr. Hoke would be legislative. Is the act the less of the former character because it does not recite an abuse by Henderson, or other cause of forfeiture? Is not such forfeiture assumed ⁴⁷¹ in it? For it is impossible in the nature of things that Mr. Hoke can be rightfully put in, unless the other be rightfully put out."

In the case of *State Prison etc. v. Day*, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295, Throop on Public Officers, section 20, is quoted with approval as follows: "Nor can the legislature take from the officer the substance of the office, and transfer it to another, to be appointed in a different manner, and to hold by a different tenure, although the name of the office is changed, or the office divided, and the duties assigned to two or more officers under different names."

In that case the question which the court had under consideration arose out of the fact that the legislature had attempted to abolish the office of superintendent of prisons and to create a board of directors of three to perform the same duties. In addressing itself to the question thus presented, the court said: "No function or duty that was formerly performed or imposed upon the superintendent is abolished. The functions and duties of that office are still necessary to the public welfare. They have not been abolished. They have simply been transferred to others. That cannot be done according to the law of the land. That three of the directors have been made the governing head of the institution, under the name of 'executive board,' and that to them the duties and functions of the office of superintendent have been transferred, does not change the application of the law. It is the same as ⁴⁷² if the duties of the office had been transferred to one person. It is not a valid argument to contend that the executive board can conduct a state's prison in a better and more satisfactory manner than can one man. It may be true in point of fact, and that plan can be tried at the end of the defendant's term of office."

In a concurring opinion delivered in the same case by Furches, J., it is said: "That case [Hoke v. Henderson], and every case since that case discussing the right of an incumbent to hold his office, recognizes the right of the legislature to abolish a legislative office, and that, when the office is abolished, the right of the incumbent to hold it is gone, because there is no office to hold. But all the reported cases from Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677, down to and including State v. Bellamy, 120 N. C. 212, 27 S. E. 113, hold that, to have the effect of ousting the incumbent before his term expires, the office must be abolished; that it is not sufficient to declare that it is abolished when it is not abolished; that the office is intangible, and consists in the duties of the office, and while those duties are continued the office is continued. The discussion then comes down to this: Are the duties of the office which defendant held abolished or are they transferred to others?"

In the case of Wood v. Bellamy, 120 N. C. 212, 27 S. E. 113, it appeared that the legislature of North Carolina in express terms essayed to abolish the offices of superintendent and directors of the hospital, purporting ⁴⁷⁸ to create new corporations, and declaring that it was not the intention of that body to constitute the trustees and other agencies of the corporation officers; but the supreme court of that state held that the abolition of the offices was only nominal, that the functions and powers of the incumbents were substantially unchanged, and they could not be deprived of their constitutional right to exercise the duties, functions and powers of their offices until the end of their terms. The court said: "But the plaintiffs further contend that because the act declares that the offices of superintendents of the old corporations are abolished, and the offices of principal and resident physician substituted therefor (the latter elected for four years, instead of six, as was the superintendent), and because the government of the new corporation shall be under the management of nine trustees, called the 'board of trustees,' elected for a term of four years, instead of in classes of three for six years, the terms expiring at different times, as under the Code, and called the 'board of directors,' the officers under the old corporation are abolished, and the new ones take their places. This contention cannot be sustained. The legislature of 1870-71, upon the return to power of one of the political parties, undertook to remove the officers of a North Carolina institu-

tion for the deaf, dumb and blind, who were of another political faith, and in the act for that purpose (chapter 35, page 38) resorted to this same device of changing the name of ⁴⁷⁴ the offices to carry out their purpose. That act (1870-71) called the new board which it created the 'board of trustees,' in substitution of the old board, which was called the 'board of directors,' and used the very word used in the act of 1897, 'abolished.' It declared that the board of directors should be abolished, and the powers, rights and duties heretofore prescribed by law to said board shall hereafter be granted to and imposed upon the board of trustees. It seems that the new board (called the 'board of trustees') took possession of the property and affairs of the corporation; but upon an action being commenced by the old board of directors against the board of trustees, and brought to this court on appeal, it was held that the legislative appointment was invalid, and that the title to the offices was in the old board of directors. It was also held that the legislature had the right to change the name of the board by which the institution was governed from the board of directors to that of the board of trustees, but in doing so it left the board the office to be filled by officers: *Nichols v. McKee*, 68 N. C. 429. The act did not, in fact, abolish the offices by changing the name of the board, although the act declared that the board of directors was abolished. The offices were left as before, and the abolition of the board of directors was one of words only': *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 115, 116.

In disposing of a clause in the act by which the legislature undertook to interpret what they were doing, ⁴⁷⁵ to the effect that the new trustees were not intended to be created officers, the court said: "Those places have been held to be offices, as we have declared in this opinion, and the legislature, by simply declaring that they shall not be offices, does not change the nature of the thing. In the case of *Clark v. Stanley*, 66 N. C. 63, 8 Am. Rep. 488, Chief Justice Pearson, delivering the opinion of the court, defining what a public office is, said: 'A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. The essence of it is the duty of performing an agency; that is, of doing some acts, or a series of acts, for the state.' It is as idle, under the decisions of this court, to say that such a position as these defendants hold is not an office, as it would be to say that a horse is not a horse, because one may choose

to call him some other animal: *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 116.

Concluding, the court said: "The effect of the act, then, is that it has only a prospective operation as to the change of the name of the institution, and the name of the offices connected with it, and that the defendants (the incumbents) are entitled to hold onto their offices, the defendant Kirby for the term for which he was elected, and the other defendants for the terms for which they were appointed, and until their successors are duly elected or appointed and qualified": *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 117.

⁴⁷⁶ In *Silvey v. Boyle*, 20 Utah, 205, 57 Pac. 880, the relator was appointed captain of police of Ogden City. He discharged the duties of his office until February 15, 1898, when he was attempted to be discharged, pursuant to an ordinance passed by the council on January 31, 1898, which defendants claimed abolished the office. On February 7, 1898, another ordinance was passed and approved, which provided again for the office of captain of police. Thereupon, on February 11th, one S. T. Whitaker was appointed to the office. The only question presented and argued in the briefs of counsel was: "Did the ordinance of January 31, 1898, work an abolition of the office of captain of police?" In disposing of this question the court said: "The power which created it (the office) had the right to abolish it at any time, and where the office is abolished the presumption prevails that the services which the discharged officer was wont to perform are no longer required by the public, and no implication injurious to the incumbent can arise because of this dismissal, and no explanation or defense can avail him, and therefore no charges in such event need be preferred. This court so held in *Heath v. Salt Lake City*, 16 Utah, 374, 52 Pac. 602.

"In the case at bar, however, it will be noticed that, within a few days of the passage of the ordinance which appellants claim abolished the office, another one was passed providing for the same office, that both ordinances were published on the same day, and that on the ⁴⁷⁷ day previous to the publication another person was appointed to fill the office. This shows that before the ordinance which is claimed to have abolished the office could become operative the same office was again created. . . . It is too clear for argument that the real purpose and design was not to abolish the office, but to get rid of one incumbent to make room for another. The method

pursued to effect the removal is not such as commends itself to a court of justice. An officer whose tenure is during good behavior, or who can only be removed for cause, cannot thus be legislated out of office: *People v. McAllister*, 10 Utah, 357, 37 Pac. 578; *Pratt v. Board*, 15 Utah, 1, 49 Pac. 747; *Heath v. Salt Lake City*, 16 Utah, 374, 52 Pac. 602; *Pratt v. Swann*, 16 Utah, 483, 52 Pac. 1092."

The same rule is laid down in Kentucky. In *Adams v. Roberts*, 119 Ky. 364, 83 S. W. 1035, it is said: "Though the legislature is given the power to abolish the office of commonwealth's attorney in this state, until it does so it cannot abolish the tenure of any rightful incumbent of the office. He might be impeached, but not legislated out of office: *Cooley's Constitutional Limitations*, 6th ed., 482; *Black's Constitutional Prohibitions*, p. 119, sec. 99."

To the same effect is *State v. Wiltz*, 11 La. Ann. 439, wherein the court said: "It is inadmissible to say that a person holding an existing office under a fixed tenure can be removed or that his regular term of office can be abridged by an ⁴⁷⁸ ordinary act of the legislature other than an act abolishing the office."

The same rule obtains in this state. In *State v. Leonard*, 86 Tenn. 485, 7 S. W. 453, the court had under consideration chapter 84, page 163, acts of 1887, which contained the following provisions:

"Sec. 2. Be it further enacted that from and after the first Monday in April, 1887, the office of chairman of Marshall county court is, and shall be, hereby restored and re-established in said county, with all the rights, privileges, jurisdictions, duties and powers, possessed by, and vested in, and belonging to the office of chairman and judges of the county court of the various counties of this state, and that from and after the said first Monday in April, 1887, the office of the county judge of Marshall county be, and is, and shall be, hereby abolished.

"Sec. 4. Be it further enacted that the chairman of the county court of Marshall county shall have, possess, exercise and discharge all the rights, privileges, and duties and shall have, possess and exercise and discharge all jurisdiction, powers, duties and privileges now possessed, exercised and discharged, and vested in, imposed and conferred by the act of 1875, chapter 70, and all existing laws upon the chairman of the county courts of the various counties in the state; and said

chairman is further invested with all the power and with the same jurisdiction and authority wherewith county judges are now invested, and shall comply with all the ⁴⁷⁹ requirements of, and perform all the duties imposed by law, creating and regulating the powers and duties of chairmen of the county courts and county judges of this state."

The court held that the foregoing act simply changed the name of the office, leaving its duties intact, and devolved those duties upon a person other than the incumbent at the time, and did not in fact abolish the office, but was an abortive attempt to legislate the incumbent out of office. It was held that this could not be done.

The same doctrine is recognized in *Halsey v. Gaines*, 2 Lea, 316, 324, 325; *Judges' Cases* (*McCulley v. State*), 102 Tenn. 509, 53 S. W. 134; *State v. Lindsay*, 103 Tenn. 625, 53 S. W. 950; *Redistricting Cases* (*Granger County v. State*), 111 Tenn. 234, 80 S. W. 750; *State v. Hamby*, 114 Tenn. 361, 84 S. W. 622.

In the case before the court it appears that the act purports to abolish all offices existing under prior acts, and in the same act the same offices are re-enacted under different names. Under the former city charter there was a city tax assessor, whose duty it was to assess property in the city for taxation; under the present act there is a city assessor whose duty is the same. Under the former acts there were a city attorney and assistant attorney, whose duty it was to attend to the city's legal business; under the present act there is a city counselor and assistant counselor, whose duties are the same. Under the former acts there was a judge and a clerk of the city court; under the present act there is a judge ⁴⁸⁰ and a clerk of the corporation court, the jurisdiction being the same, and the duties of these offices the same. The chief officer of the city was formerly styled "mayor"; under the present act he is called "president." In both cases his duty is to exercise a general superintendence over the city and to see that the laws are enforced. So, under the former acts what is now called the "vice-president" was then called the "vice-mayor," with substantially the same duties. It does not matter that the duties of these several officers may be to some extent enlarged under the present act as compared with the prior acts. The offices are substantially the same, the names being merely changed.

Men cannot be legislated out of office in this way. Even if the statute in question, or bill purporting to be a statute, could be treated as a valid amendatory act of prior legislation, it could not have the effect to remove the officers above named, and create a vacancy to be filled by appointment, since the same act which purports to abolish the offices restores them under another name. However, the act is wholly void.

So there is no point of view from which the demurrer can be sustained. It results that the decree of the chancellor must be reversed and the cause remanded.

In the Exercise of Its Police Power, a city may prohibit pigpens, dairies, etc., within certain prescribed limits in the city, and it may make the prohibited area coextensive with the city limits: *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614; *Miller v. Syracuse*, 168 Ind. 230, 120 Am. St. Rep. 367.

Taxes on Property must be Equal and Uniform, as a rule, and the legislature has no authority to discriminate for or against any locality, person, or property: *State v. Chicago etc. R. R. Co.*, 195 Mo. 228, 113 Am. St. Rep. 661; *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914; *Hutchinson v. Ozark Land Co.*, 57 Ark. 554, 38 Am. St. Rep. 258; *State v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765; *State v. Travelers' Ins. Co.*, 70 Conn. 590, 66 Am. St. Rep. 138.

A Public Officer does not Have a Property Right in his office: *State v. Grant*, 14 Wyo. 41, 116 Am. St. Rep. 982; *Taylor v. Beckham*, 108 Ky. 278, 94 Am. St. Rep. 357. The legislature may remove public officers, not only by abolishing the office, but by declaring it vacant: *Attorney General v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606. And the legislature, in substituting a new form of city government for an old one, has power to abolish the elective office of mayor and substitute therefor the office of recorder. And as a municipal office may be abolished by the legislature by a change of the charter, the question how great or how small the changes by the new charter shall be, and to what particulars they shall apply, is one wholly for legislative consideration: *Commonwealth v. Moir*, 199 Pa. 534, 85 Am. St. Rep. 801.

The Sufficiency of the Title to Statutes, within the constitutional requirements, is discussed in the notes to *Crookston v. County Commissioners*, 79 Am. St. Rep. 456; *Bobel v. People*, 64 Am. St. Rep. 70. This question is discussed with special reference to amendatory acts in the note to *Lewis v. Dunne*, 86 Am. St. Rep. 267.

HAYNES v. STATE.

[118 Tenn. 709, 105 S. W. 251.]

LIQUORS.—Ignorance that Liquors are Intoxicating constitutes no defense or excuse for their unlawful sale. The seller must know at his peril whether or not they are intoxicating, and his belief that they are not, however honest, and resulting from a guaranty under which he bought them, is no excuse. (pp. 1058, 1059.)

J. W. Kirkpatrick & Son, for the plaintiff in error.

Attorney General Cates, for the state.

710 HENDERSON, S. J. The plaintiff in error was indicted in the circuit court of Lauderdale county in one count for selling intoxicating liquors without license, and in another count for selling same within four miles of a schoolhouse. Upon trial before the jury there was a general verdict of guilty, and the court fixed the punishment under the first count at a fine of fifty dollars and confinement in the county workhouse for six months. Motion for new trial having been overruled, there is appeal in error to this court.

The plaintiff in error was engaged in the grocery business at Ripley. In connection with this he sold cider, phosphate, and soda-pop. The claim of the state is that the cider would intoxicate. Upon motion of plaintiff in error the attorney general in the court below elected to ask conviction upon the sale of cider claimed to have been made to one Luther Vaughan.

711 The first error assigned is that the evidence preponderates against the verdict. We have carefully considered the evidence in the case, and this assignment is overruled. While there is some conflict in the testimony, we think the verdict of the jury is sustained.

The second error assigned is to the exclusion by the trial judge of the testimony of Ode Smith, a salesman for the Dyersburg Wholesale Company, who sold the cider to plaintiff in error. The following is the excluded testimony: "When I sold this cider to W. G. Haynes, I represented and guaranteed that it contained no alcohol and would not intoxicate." He further testified, which was excluded, that he sold the cider to the general trade; had eight or ten customers in Lauderdale county who buy the cider; that he never knew or heard of any complaint by any customers handling this cider, except in this case.

The following is our legislation on the subject: Shannon's Code, section 991: "The right to sell spirituous, vinous or fermented liquors is a taxable privilege in the sense of the twenty-eighth section of the second article of the constitution." Shannon's Code, section 6795: "It shall not be lawful for any person to sell or tipple any intoxicating liquors, including wine, ale and beer, as a beverage, within four miles of any schoolhouse," etc. Acts 1899, page 309, chapter 161, section 1: "That any person or persons selling, or aiding in selling in any way whatever, intoxicating liquors, without a license required by law, shall be guilty of a misdemeanor," etc.

⁷¹² The court charged the jury on the subject as follows: "What is meant by intoxicating liquors is anything that will intoxicate, and it does not make any difference by what name it is called. If Mr. Haynes sold to Luther Vaughan the stuff of any kind that intoxicated him or that was intoxicating, you should convict."

Defendant disclaims knowledge of the intoxicating character of the cider. His counsel urges that it is a fundamental principle of criminal law that there must be a criminal intent of the mind, coupled with the act, in order to constitute a crime. He cites the case of *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614, decided by the supreme court of Ohio. In that case the defendant had been selling bitters, and was indicted for selling intoxicating liquors. The court says: "In such case the maxim of the criminal law, '*Ignorantia facti excusat*,' applies to this case. The excusing principle of this maxim applies with great force where the business is recognized as lawful, and a transaction in its prosecution only becomes criminal when it is carried on with a purpose to violate the law. To give this maxim practical effect in a proper case, it is but an assertion of natural justice, for the reason that to render an act criminal the intention with which it is done must be so. The will must concur with the act. To make a transaction criminal, there must be both will and act entering into the transaction."

The opinion in that case was by a divided court; and, even had it been otherwise, it is not sound in principle, ⁷¹³ and is contrary to the weight of authority in this and other states. It is the sale of intoxicating liquors without license which the statute prohibits, and it is unlawful to sell intoxicating liquor of any character without license. This being so, the seller

must find out at his peril whether the liquor he proposes to sell is intoxicating or not. Guilty knowledge is not by the statute made an ingredient of the offense.

Quite a number of authorities might be cited in support of this. In the case of *State v. Hartfiel*, 24 Wis. 60, it is held that the sale of intoxicating liquors to a minor is an offense under the statute, though the vendor did not know that the purchaser was a minor. The court in that case says: "The words 'knowingly' and 'willfully,' or other words of equivalent import, are omitted from the statute, and the offense is made to consist solely in the fact of a sale of intoxicating liquors or drinks to a minor."

Numerous authorities could be cited to the effect that where a statute commands that an act be done or omitted, which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse violation: 3 Greenleaf on Evidence, sec. 21; *Barnes v. State*, 19 Conn. 398; *Commonwealth v. Mash*, 7 Met. (Mass.) 472; *Commonwealth v. Boynton*, 2 Allen (Mass.), 160; *Merrick v. Plumley*, 99 Mass. 567.

In *Ulrich v. Commonwealth*, 6 Bush (Ky.), 400, it is said: "It is as incumbent on the vender of liquor to know that his ⁷¹⁴ customer labors under no disability as it is for him to know the law, and his ignorance of neither will excuse him."

In the case of *Commonwealth v. Boynton*, 2 Allen (Mass.), 160, it is said: "The court are of the opinion that the sale of intoxicating liquors, in violation of the statute prohibition, is not one of those cases in which it is necessary to allege or prove that the person charged with the offense know the illegal character of his act, or in which a want of such knowledge would avail him in defense. If the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article which he sold. When the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew that he could do so lawfully, if he violates the law, he incurs the penalty. The salutary rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases; and the hardship is no greater where the law imposes the duty to ascertain the fact."

It is said in 1 Wharton on Criminal Law, section 88: "It is no defense to an indictment for keeping or selling adulterated or intoxicating liquors that the defendant did not believe them to be intoxicating or adulterated. So, on an indictment for selling adulterated milk, the defendant is not protected by ignorance of the adulteration, or even by relief that the milk was pure; and the same ⁷¹⁵ rule applies to indictment for selling other deleterious drinks. In several states, selling intoxicating liquors to minors is indictable by statute, and in such cases also arises the question whether the defendant knew that the vendee was a minor. Here, again, we have the rule before us applied; it having been repeatedly held that, in cases in which knowledge is not part of the statutory offense, ignorance in this respect, coupled with the honest belief that the vendee was of full age, is not a defense. And the same rule applies to all cases of dealing illegally with minors. It is also no defense to an indictment for selling to persons of intemperate habits that the defendant did not know that the vendee was of intemperate habits, though it is otherwise when the statute makes the offense to be selling to persons of known intemperate habits, in which case knowledge is an ingredient of the prosecutor's case."

In 2 Wharton on Criminal Law, section 1507, after discussing the same question, it is said: "But to such defenses the answer has been already given that when a specific act is made by law indictable, irrespective of the defendant's motive or intent, his belief that he was right in what he did, based on a mistake of fact, is no defense. Eminently is this the case with regard to intoxicating drinks."

In 17 Encyclopedia of Pleading and Practice, page 384, it is said: "In all prosecutions for violations of the liquor laws, the defendant's ignorance of the intoxicating properties of the liquors sold or kept for sale constitutes no defense. He ⁷¹⁶ is bound at his peril to know whether or not the liquors are intoxicating."

In *Atkins v. State*, 95 Tenn. 474, 32 S. W. 391, it is held that one believing that he has a lawful right to operate a gambling contrivance is no defense for violation of the laws against gaming.

In *Moore v. State*, 96 Tenn. 544, 35 S. W. 556, the trial judge charged the jury that the statute against the sale of intoxicating liquors "was intended to and did prohibit the sale as a beverage of wine, ale and beer, and also all other

liquors which were intoxicating, whether called beer, wine, whisky, ale, cider, hop tonic, or whatever name they be known by, and that defendant could not lawfully sell hop tonic or cider within four miles of a schoolhouse where a school is kept, if such hop tonic or cider was intoxicating, and would make men drunk, and was sold as a beverage, and was not in an incorporated town."

"This," says the court, through Caldwell, J., "is a sound interpretation of the law applicable to the case before the court—a construction manifestly in accord with the contemplation of the legislature."

So it can make no difference under what guaranty plaintiff in error purchased the cider. If he sells it, he must know at his peril whether it is intoxicating or not; and his belief that it was not, however honest, is no excuse.

The result is that this second assignment of error is overruled, and the judgment of the circuit court is affirmed.

One Who Sells Liquor to a minor, though ignorant of his minority, incurs the penalty of the law prohibiting such sales: *State v. Sasse*, 6 S. Dak. 212, 55 Am. St. Rep. 834; *People v. Curtis*, 129 Mich. 1, 95 Am. St. Rep. 404. Compare *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614. And in a prosecution for selling a substance made in imitation of butter, it is not incumbent on the state to show that the defendant had knowledge of the imitation or had an intention to deceive the purchaser: *State v. Rogers*, 95 Me. 94, 85 Am. St. Rep. 395; *Fox v. State*, 94 Md. 143, 89 Am. St. Rep. 419.

FULMER v. BATES.

[118 Tenn. 731, 102 S. W. 900.]

DEEDS—Warranty of Existence of Street.—The fact that a deed describes the land as bounded by a certain street or alley raises no implied warranty that such street or alley exists, if the grantor is not the owner of the soil therein. (p. 1063.)

Finlay & Finlay, for the plaintiff.

Bartels & Trezevant, for the defendant.

732 HENDERSON, S. J. Defendant Bates, for the consideration of seven thousand seven hundred and fifty dollars, conveyed by deed to complainant Fulmer certain real estate in Memphis by the following description: "Lots Nos.

1 and 2 of part of lot 5, block 53, of the plan of South Memphis, fronting $37\frac{1}{2}$ feet, each, on the south side of Linden street, and running back south, between parallel lines, 154 feet, to a twenty-foot alley in the rear."

The claim is that no alley of any kind exists, or ever existed, in the rear of said lots, and that the covenants of said deed have been breached by defendant; that complainant has been damaged thereby in the sum of two thousand one hundred dollars; and the bill is filed to recover therefor. The deed contains the usual covenants of seisin, right to convey, nonencumbrance and general warranty.

Defendant denies liability, claiming that by the deed which he executed he gave no guaranty or warranty of the existence of said alley, and alleging that the soil in the rear of said lots did not belong to him, and that the reference to the alley in the deed was simply descriptive. The chancellor dismissed the bill, and complainant has appealed.

The error assigned is that the court erred in holding that complainant was not entitled to any relief, and in dismissing his bill, and in not holding that he was entitled ⁷³³ to recover damages from defendant for breach of covenant.

In certain partition proceedings in the chancery court of Shelby county lot No. 1 had been allotted and set apart to Mrs. Flora Meyer and lot No. 2 to Mrs. Lena Bakrow, both of whom had conveyed to defendant; and his deed to complainant refers to these partition proceedings and deed for description of the property. The deeds from these two to defendant contain the same description of the lots as that in his deed to complainant; both calling for a twenty-foot alley in the rear. Defendant did not, as a matter of fact, own the land in the rear of the lots conveyed by him.

Counsel makes the following stipulation: "In this cause, for the purposes of saving trouble and expense, it is agreed that the following are facts, and may be treated as proved in the cause by the complainant.

"The tract, composed of the two lots sold by defendant to complainant and described in the bill and the two lots in the rear of the same, running from Linden street to Pontotoc street, is inclosed as one lot by fences on its four sides and used by the occupants of the house standing on the lots afterward sold to complainant as aforesaid. This inclosure was made prior to 1884, and was continuously maintained until the conveyance, exhibit A to the bill herein. There was never

any alley of any description in the rear of said lots sold complainant, and the strip on the south ⁷³⁴ side thereof was a part of the inclosure aforesaid. Said strip was never used by the public or private individuals as an alley."

The matter of the existence of the alley in the rear was discussed by the parties before the execution of the deed; and complainant, being doubtful about its existence, consulted his attorney, who advised him that the alley did exist.

The only reference to the alley in the deed is that first above quoted therefrom, giving the description of the lots. The habendum clause is as follows: "To have and to hold the aforesaid lots or parcels of land, with all and singular the improvements, easements, hereditaments and appurtenances of and to the same belonging or in any wise appertaining, to the said J. D. Fulmer, and to his heirs and assigns, forever, in fee simple." This is followed by covenants of seisin and general warranty.

The record presents the question as to whether the language of the deed referred to constitutes a covenant that there was a twenty-foot alley in the rear of the lots, when the defendant did not own the soil upon which it is claimed that the alley should be.

There is no express covenant in the deed that defendant owns the alley referred to, and as a matter of fact he did not.

In 3 Washburn on Real Property, page 412, it is said: "A reference to a street or way as a boundary of ⁷³⁵ land granted, though it might estop the grantor from denying the existence of and a right to use such street or way by the grantee, provided the grantor was the owner of the land so described as a street or way, would not amount to an implied covenant that it did or would exist as such street or way."

This authority is cited in Scott v. Cheatham, 12 Heisk. 720, where it is said "that such reference to the streets and alleys as boundaries would not amount to an implied covenant that they did or would exist as such streets or alleys. On this point, however, there is an apparent conflict in the authorities. Mr. Washburn says that in Van O'Linda v. Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261, it held that such reference would amount to an implied covenant on the part of the grantor that there were such streets and alleys. This probably means no more than that the grantor is estopped from denying the existence of such streets and alleys."

There is a marked distinction between the case of a grantor who owns the street or alley which his deed describes as bounding the property conveyed, and one who does not. In the former case, although there may not be an express warranty on the subject, the grantor is estopped from denying the existence of the street or alley. In the latter case, the reference is only descriptive, and no warranty is implied. The conflict of authorities on this subject is more apparent than real, ⁷³⁶ dependent upon into which of the two classes the cases fall.

Parker v. Smith, 17 Mass. 415, 9 Am. Dec. 159, is cited by appellant, where it is said: "The principal question in this case arises upon the construction of the deed of Joseph Russell to Benjamine Taber, in which he conveys a piece of land in what is now the town of New Bedford, bounding it southwardly or westwardly on a way or street. By this description the grantor and his heirs are estopped from denying that there is a street or way to the extent of the land on those two sides. We consider this to be not merely a description, but an implied covenant that there are such streets. It probably entered much into the consideration of the purchase that the lot fronted upon two ways, which would always be kept open, and, indeed, could never be shut without a right to damages in the grantee or his assigns."

This case is reviewed by the same court in *Howe v. Alger*, 4 Allen, 206, where it is said: "The case of *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 159, is a leading case upon this subject.

"The premises there conveyed were described as bounded on two sides by streets. The grantor was the owner in fee of the contiguous land that would have formed the two streets. The defendants, who claimed under the grantor, denied the grantee any rights as to the use of the contiguous land for a street or way.

"That court say that 'the grantor and his heirs are ⁷³⁷ estopped from denying that there is a street or way to the extent of the land on those two sides. We consider this to be, not merely a description, but an implied covenant that there are such streets.'

"We here find the first use of the language that such a boundary upon a street is an 'implied covenant' that such streets exist.

“It was used in reference to a conveyance where the grantor was the owner of the adjacent land, embracing the so-called street.

“It was used in the case of an estoppel as respects the grantor, and upon that ground alone, the grantee might well maintain his right to the maintenance and use of a street. The further remark, as to the existence of an implied covenant, may reasonably be presumed to have been applied to the case there presented of a grantor being the owner of the land described as a street.”

In *Howe v. Alger*, 4 Allen, 206, it is held that if land be conveyed as bounding on a street, and the grantor has no interest in the adjacent land so described, this does not amount to an implied covenant that there is such a street laid out. After a discussion of a number of authorities on the subject, the court says: “Without a further or more extended examination of the cases cited by the plaintiff, it is sufficient to say that in all the cases cited under this head the grantor was the owner of the adjacent land described in the ⁷³⁸ boundary as a street or way, and that the decision of the cases in favor of the various grantees required nothing further than the application of the doctrine of estoppel to the grantors and those claiming under them to deny the existence of the street.”

There was no misrepresentation by defendant in his sale to complainant in this case. He believed that there was a twenty-foot alley in the rear of the lots, though it had never been opened. The partition proceedings and deeds under which he claimed called for the alley. The attention of complainant was called to the matter before he accepted the deed. Being in doubt about the existence of an alley, he consulted his attorney. In order to maintain his claim for damages against defendant, he should have required an express covenant on the subject. Failing to do so, none will be implied from a mere description given in the deed.

It results that there is no error in the decree of the chancellor, and it is affirmed.

If Land is Described as Bounded by a Way, this is said to be not merely a description, but an implied covenant that there is such a way: *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157; *White v. Flannigan*, 1 Md. 525, 54 Am. Dec. 668; *Moale v. Mayor*, 5 Md. 314, 61 Am. Dec. 276. See, too, *Riverside v. MacLain*, 210 Ill. 308, 102 Am. St. Rep. 164; *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56.

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2. **BENEFICIAL ASSOCIATIONS—Form of Government**.—A fraternal benefit association must have a representative form of government when required to do so by statute, and this requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, shall be chosen by the members. (Neb.) *Lange v. Royal Highlanders*, 786.

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8. BENEFICIAL ASSOCIATIONS—Future By-laws, Agreement to be Bound by.—A member of an association who agrees before becoming such that he will comply with the by-laws then in force, or which may be thereafter adopted, is bound by subsequently adopted by-laws, if they are reasonable in their nature. (Neb.) *Lange v. Royal Highlanders*, 786.

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12. SOCIETIES, Liability of, for Personal Injuries During Initiation.—The Supreme Tent of the Knights of the Maccabees is a corporation having jurisdiction over the subordinate lodges or tents, and the members and officers conducting the ceremony of initiating a proposed member may be regarded as the lawfully constituted agents of the Supreme Tent, which may therefore be held answerable for personal injuries inflicted on a proposed member during the ceremony of initiation by an act authorized by the ritual. (N. Y.) *Thompson v. Knights of Maccabees*, 879.

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1. NEGOTIABLE INSTRUMENTS—Holding an Undisclosed Agent.—If a negotiable instrument has nothing on its face to connect the payee with the person for whom he was an agent or for whose benefit it was given, the latter cannot be held liable under an indorsement thereof made by the person named as payee. (Kan.) *New York Life Ins. Co. v. Martindale*, 362.

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2. **PROMISSORY NOTE—Fraudulent Alteration, Failure to Instruct as to Legal Interest.**—Where the maker of a note sued thereon defends on the ground that it has been fraudulently altered since its execution by inserting therein a provision making it bear interest at the rate of five per cent per annum, it is reversible error to refuse to instruct the jury that if the note as executed contained no specification of the rate of interest, it would bear interest at the rate of six per cent, though if the note was really fraudulently altered after its execution, it is not material whether, as altered, it is more or less onerous to the obligor. (Kan.) *New York Life Ins. Co. v. Martindale*, 362.

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4. **FOREIGN BILLS OF EXCHANGE—Conflict of Laws.**—The rights and obligations of the drawer of a bill of exchange are determined and fixed by the law of the place where he draws and transfers it, and he is discharged by the failure to protest it in accordance with the laws of that place, although such failure is due to different laws and customs prevailing in the country where the bill is payable. (N. Y.) *Amsinck v. Rogers*, 858.

5. **BILLS OF EXCHANGE.**—The Contracts of the Different Parties to a Bill of Exchange are Independent, and carry different obligations. The drawer does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, and on default of such payment upon due notice, to reimburse the holder in principal and damages at the place where the contract was entered into. (N. Y.) *Amsinck v. Rogers*, 858.

6. **BILLS OF EXCHANGE, Foreign, by What Law Governed.**—The Contract of the Drawer of a Bill of Exchange is regarded as made at the place where it is drawn, and it is governed by the law of that place in regard to the payee and any subsequent holder as to its form and nature, obligation and effect. (N. Y.) *Amsinck v. Rogers*, 858.

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9. **BILLS OF EXCHANGE, Foreign, When Deemed to be Controlled by the Laws of the Country Where Drawn.**—Where a bill of exchange or order for the payment of money is drawn, negotiated and transferred by a house or firm doing business in New York, but

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2. **CARRIER—Contract Releasing Liability to Express Messenger.** A contract entered into in Virginia whereby an express messenger at the time of his employment releases the express company and the railway company from all claims for injuries he may receive, through negligence or otherwise, which contract is intended to operate in Virginia, Kentucky and other states, is void under the provisions of the Kentucky constitution that no common carrier shall contract for relief from its common-law liability, and does not affect his right to recover for injuries sustained in that state. (Ky.) *Davis v. Chesapeake etc. Ry. Co.*, 481.

3. **CARRIER—Starting Car Before Passenger is Seated.—**A street railway company is not required to hold its car still until every passenger that boards it takes a seat, unless he is old, feeble or otherwise in a condition demanding unusual care. (Ky.) *Bennett v. Louisville Ry. Co.*, 453.

4. **CARRIERS, Duty of to Persons Assisting Passengers.—**A carrier owes a duty to persons who come upon a train accompanying passengers with an intention of getting off before the train starts, and if the conductor knows of the person so accompanying a passenger, he is bound to give such person a reasonable time to alight

before starting, and if, after the train is started, such person alights and, in doing so, is injured, his act of alighting is not contributory negligence, and the carrier is answerable for the damages suffered. (Ala.) *Southern Railway Co. v. Patterson*, 30.

5. **RAILWAYS—Notice to Conductor of Purpose of Person Assisting a Passenger, What Sufficient.**—If a person boards a railway train for the purpose of assisting an old lady who is nearly blind, and, before doing so, tells the conductor of her condition and need of assistance to get upon the train and to secure a seat, and is requested by the conductor to assist her, the company is chargeable with notice of the purpose of such person, that he did not intend to become a passenger, and would seek to alight from the train. (Ala.) *Southern Ry. Co. v. Patterson*, 30.

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Contract to Furnish Cars.

8. **RAILWAYS—Livestock Contract, When does not Merge Previous Negotiations for the Furnishing of a Car.**—If, on application to a railway company, it agrees to furnish cars at a date specified for the shipping of livestock, but, failing to do so, it furnishes such cars at a subsequent date and exacts from the shipper what is known as a livestock contract, such contract does not relate to nor merge the prior contract to furnish cars, nor prevent the recovery of damages for not complying with it. (N. Y.) *Clark v. Ulster etc. R. R. Co.*, 848.

9. **RAILWAYS, Contract of to Furnish Cars, When Mutual.**—If an intending shipper applies to an agent of a railway company for a car in which to make a shipment and the company agrees to furnish it, there arises by implication of law an agreement on the part of such shipper to use the car if furnished, and, in case of not using, to pay whatever loss may have accrued to the company. (N. Y.) *Clark v. Ulster etc. R. R. Co.*, 848.

10. **RAILWAYS—Contract to Furnish Cars, When Arises and Effect of.**—A shipper's orders calling for a specified number of cars for a specified date will, when accepted by the carrier, constitute a contract binding on it to furnish the cars and on him to furnish the goods with which to load them. (N. Y.) *Clark v. Ulster etc. R. R. Co.*, 848.

11. **RAILWAYS, Station Agents of, Implied Authority to Contract for the Furnishing of Cars.**—If an intending shipper applies to the station agent of a railway company for a car to be furnished at a time and for a purpose specified, and the agent answers that the shipper can have the car, a contract is thereby created between the carrier and the shipper upon which the former is answerable in dam-

ages on failing to furnish the car as promised. The authority to make the contract is implied, as within such agent's employment. (N. Y.) *Clark v. Ulster etc. R. R. Co.*, 848.

Ownership of Consigned Property.

12. **CARRIERS—Ownership of Property Consigned—Right to Sue.** If a shipper delivers his property to a carrier, marked and addressed to another person as consignee, and gives the carrier no other or further notice than that to be presumed and inferred from the act of consignment, the law will presume the contract for transportation to have been made for and on behalf of the consignee, and that he is the owner of the property and entitled to its possession and to sue therefor. (Idaho) *Pratt v. Northern Pac. Ex. Co.*, 268.

13. **CARRIERS—Ownership of Goods Consigned.**—If a shipper delivers his property to a carrier without special instructions as to its ownership or its delivery on any condition, the consignee becomes immediately entitled to the possession of the property, and may demand and lawfully receive it forthwith from the carrier, and the latter is justified in delivering it to the consignee at any point on its line of transportation. (Idaho) *Pratt v. Northern Pacific Exp. Co.*, 268.

14. **CARRIERS—Express Companies—Ownership of Property Consigned—Right to Sue.**—If a consignor intrusts money to an express company with general directions to deliver it to a consignee named, he thereby vests the right to the possession of the money in the consignee, and in the absence of any different or contrary instructions, or any demand for the money, prior to the consignee's demand therefor, the latter is entitled to recover it, upon the failure and refusal of the express company to deliver the money to him. (Idaho) *Pratt v. Northern Pacific Exp. Co.*, 268.

15. **CARRIERS—Ownership of Property Consigned.**—If property is received by a carrier on an unconditional and unrestricted consignment, the carrier not only may, but must, treat the consignee as the absolute owner until it receives notice to the contrary. (Idaho) *Pratt v. Northern Pac. Exp. Co.*, 268.

Loss of Goods—Act of God.

16. **NEGLIGENCE, Loss Resulting Partly from and Partly from Other Causes.**—If a carrier is guilty of negligence not in itself harmful, but wrongful only because of injurious consequences which may follow, and a new cause intervenes between such negligence and the injury complained of, which new cause is not a consequence of the original negligence, which reasonable prudence on the part of the original wrongdoer could not have anticipated, and but for which the injury could not have happened, the new cause is the proximate cause, and the original negligence is disregarded as not affecting the result. (Kan.) *Rodgers v. Missouri Pac. Ry. Co.*, 416.

17. **CARRIERS do not Assume the Risk of Loss Caused by the Act of God.** (Kan.) *Rodgers v. Missouri Pacific Ry. Co.*, 416.

18. **CARRIER'S NEGLIGENCE, Liability for When Followed by an Act of God.**—If a carrier negligently delays the transportation of goods, so that they are subsequently exposed to, and destroyed or injured by, an act of God, such as storm or flood, to which they would not have been exposed had they been transported with reasonable diligence, the proximate cause of the injury is the act of God and not the negligence, and the carrier is not answerable for damages. (Kan.) *Rodgers v. Missouri Pac. Ry. Co.*, 416.

Adjustment of Claims for Loss.

19. **CONSTITUTIONAL LAW—Railroads—Adjustment of Claims for Loss to Freight.**—A statute providing that common carriers shall adjust freight charges and claims for loss or damage to freight within a named time, and that if this is not done they shall be liable to a penalty, is not unconstitutional as violative of the equality clause of the fourteenth amendment to the United States constitution, or of a similar provision in a state constitution. (S. C.) *Seegers Brothers v. Seaboard Air Line Ry.*, 921.

20. **APPELLATE PRACTICE.**—Findings of a Magistrate as to the amount of damages by loss to freight caused by a common carrier, if affirmed by the circuit court, cannot be reviewed by the supreme court if there is any evidence to support them. (S. C.) *Seegers Brothers v. Seaboard Air Line Ry.*, 921.

CODICIL.

See Wills, 8, 9.

COLLISIONS.

1. **PLEADING—What not Sufficient to Charge Defendant with Knowledge.**—An averment that the defendant's servants were guilty of negligence in failing to stop the paddle-wheels to prevent the creation of a succession of large waves when a small boat with occupants was plainly visible to such servants is defective, in not further stating that such boat and its contents were actually seen by them. (Ala.) *Daniels v. Carney*, 34.

2. **PLEADING—Necessity of Averring Knowledge of Danger.**—A complaint charging negligence in not stopping the revolutions of a propeller or paddle-wheel of a steamboat when a small boat and its occupants were seen by the defendant's servants is defective, in not showing that the peril of such occupants was an obvious one, or was known to the servants. (Ala.) *Daniels v. Carney*, 34.

3. **NAVIGABLE WATERS—Respective Rights of Large and Small Boats.**—The exercise of the right of navigation is as much guaranteed to small craft as to a great steamer. Each owes the other the duty of observance of due care so as to avoid inflicting wrong and injury upon the other. The injury resulting from a violation of this duty, whether intentional or through negligence, carries with it the legal responsibility of answering in damages. (Ala.) *Daniels v. Carney*, 34.

4. **NAVIGABLE WATERS—Duty of Steamers to Stop the Revolution of Paddle-wheels to Prevent Injury to Occupants of Small Boats.**—If a steamer and a small boat are being navigated in a river, and the small boat is in such a position that the continued revolution of the steamer's paddle-wheel or propeller will create large waves sufficient to capsize or swamp the small boat in passing, thereby endangering the lives of its occupants, the steamer and its owners owe the duty to such occupants of avoiding the danger by ceasing the normal operation of the steamer and stopping the revolution of its wheels or propeller until the small boat has passed without the zone of danger of waves from the larger boat, and if, by failing to do so, any of such occupants loses his life, such owners are answerable. (Ala.) *Daniels v. Carney*, 34.

5. **NAVIGABLE WATERS—Contributory Negligence—Occupants of Small Boats, When not Presumed Guilty of.**—Where persons in a small boat in a navigable stream are safe in the absence of an

unusual disturbance in the water, and the water at the time the steamer approaches is smooth, they cannot be adjudged guilty of contributory negligence when the boat is capsized by waves due to the continuous revolution of the propeller or wheels of the steamer. Such persons had the right to assume that the navigators of large crafts would observe their duty under the law toward a small boat to avoid the infliction of injury. (Ala.) *Daniels v. Carney*, 34.

6. MASTER AND SERVANT—Steamboat, Failure to Allege that Persons Operating Were Acting in the Line of Their Authority.—In an action against the owners of a steamboat to recover for the death of a human being averred to have occurred from the negligence of servants who were operating such boat in failing to discontinue such operation and to stop the propeller or wheels of such steamer, and thereby prevent large waves by which the small boat was capsized, the complaint must allege that such servants acted at the time in the scope and line of their authority. (Ala.) *Daniels v. Carney*, 34.

COMMERCE.

1. INTERSTATE COMMERCE.—A license may be exacted from a person selling beer by the barrel, half barrel, or quarter barrel, though he purchases it in another state, whence it is shipped to him into this state and it remains in the kegs in which he receives it. (Ala.) *City of Mobile v. Phillips*, 17.

2. INTERSTATE COMMERCE, Business Which is not.—The business of brokers of making contracts to buy and sell future cotton for customers is not interstate commerce. Such contracts are not articles of commerce. (Ala.) *Ware v. Mobile County*, 21.

3. INTERSTATE COMMERCE—License Exacted for Dealing in Futures.—A license exacted of brokers who are engaged in buying and selling grain and cotton for future delivery, taking orders in Alabama, to be executed on the exchanges in New York or New Orleans, is not imposed on interstate commerce, where the contracts in which brokers deal do not contain any stipulation requiring the seller to ship the cotton or grain to any point without the state, though, as a matter of fact, such shipments are sometimes made by the seller. The subsequent shipment cannot become interstate commerce until the articles commence to be transported. (Ala.) *Ware v. Mobile County*, 21.

4. INTERSTATE COMMERCE—Termination of Interstate Transportation—Taxing Power of State.—If goods consisting of small packages are packed in one large box and shipped from one state, consigned to the shippers in another, and there received by them from the carrier at their destination, where the large box is broken open, and the small packages are delivered to purchasers in accordance with previous orders, the goods, after the large box is broken open and delivery begins, cease to be the subject of interstate transportation, and become a part and parcel of the property of the state, subject to taxation under its revenue laws. (Idaho) *Parks Bros. & Co. v. Nez Perce*, 261.

5. INTERSTATE COMMERCE—End of Interstate Transportation—Original Package—Taxing Power.—If goods consisting of small packages are packed in one large box and consigned to the shipper in another state, the original package is the large box in which the goods imported are shipped, and when such box is opened at the point of destination for the sale and delivery of the separate parcels contained in it, each parcel of the goods loses its distinctive character as an import or subject of interstate commerce, and becomes

property subject to taxation by the state as other like property situated within its limits. (Idaho) *Parks Bros. & Co. v. Nez Perce*, 261.

6. INTERSTATE COMMERCE—End of Interstate Transportation—Original Package—Taxing Power.—If goods consisting of small packages are packed in one large box consigned to the shipper in another state, the original package is the large box in which the imported goods are shipped, and after it is received by the owners at its destination and opened and the smaller packages removed therefrom for delivery to customers it ceases to be an article of interstate commerce, and is subject to the taxing power of the state where found. (Idaho) *Parks Bros. & Co. v. Nez Perce*, 261.

See Game Laws.

COMMON LAW.

1. COMMON LAW—Adoption of.—By statute so much of the common law as is applicable to our conditions and not inconsistent with the constitution of the United States, or of the state, is in force in Nebraska. (Neb.) *Kinhead v. Turgeon*, 740.

2. COMMON LAW, Adoption of, in the United States.—The principles and rules of the common law, so far as applicable to our conditions, became and continue in force unless abrogated or modified by express statutory or constitutional enactments. (N. Y.) *Waters & Co. v. Gerard*, 886.

3. COMMON LAW, Construction of Statutes and Constitutions by.—Constitutions and statutes should be construed with reference to the doctrines of the common law, and the constitutional and statutory provisions providing that a person shall not be deprived of life, liberty, or property without due process of law should not be held to have been intended to forbid or affect the right to a lien which had been recognized and sustained by the common law. (N. Y.) *Waters & Co. v. Gerard*, 886.

4. COMMON LAW, Evidence of.—Where the recognized printed reports of the English courts prior to 1775 show that the common law on any particular subject was by such cases established and determined as therein stated, such reports are the best and highest evidence of such common law. (N. Y.) *Waters & Co. v. Gerard*, 886.

CONCEALED WEAPONS.

See Weapons.

CONFESSIONS.

See Criminal Law, 6.

CONFLICT OF LAWS.

CONFLICT OF LAWS—Transfer of Title.—The transfer of title to real estate within the limits of a state is entirely subject to the laws of that state, and no interference with it can be permitted by other states. (Neb.) *Fall v. Fall*, 767.

See Sunday; Telegraphs and Telephones, 2.

CONSIGNED GOODS.

See Carriers, 12-15.

CONSTITUTIONAL LAW.*Construction of Constitution.*

1. **CONSTITUTIONS.**—One of the Aids in Constitutional Construction is an examination of the proceedings of the constitutional convention. (Ga.) Butts County v. Jackson Banking Co., 244.

Constitutionality of Statutes in General.

2. **CONSTITUTIONAL LAW.**—To Authorize the Court to Declare a Statute Unconstitutional, it must be found obnoxious to the express provisions or necessary implication of some article of the constitution, and the court will not declare a statute unconstitutional because it is opposed to the spirit supposed to pervade the constitution, or is contrary to the principles of right. (Ala.) Ex parte Owens, 67.

3. **CONSTITUTIONAL LAW**—Constitutionality of Statute, How Raised.—A general suggestion that the provisions of a statute are unconstitutional and void is permissible as a way of presenting the constitutionality of the state. (Ala.) Beauvoir Club v. State, 82.

Statute Void in Part.

4. **STATUTE VOID IN PART**—When Void in Toto.—When portions of a statute, rejected as in themselves unconstitutional, are not so merely incidental and subordinate that they can be stricken out without in any sense impairing the efficiency of the act, and are so numerous that it cannot be said that the legislature would have passed the act with these left out, the whole act must fall. (Tenn.) Malone v. Williams, 1002.

5. **CONSTITUTIONAL LAW**—Invalid Provision of Statute, When may not be Disregarded and the Remainder Enforced.—Where a statute in effect authorizing a judicial proceeding to determine the title to office of candidates at a preceding election for mayor purports to deprive the parties in interest of the right to a trial by jury, the courts will not disregard this provision as unconstitutional and declare the remainder of the statute valid. (N. Y.) Matter of Metz v. Maddox, 909.

Equal Protection of Laws.

6. **CONSTITUTIONAL LAW**—Equal Protection of Laws.—A constitutional provision that the legislature shall pass no local or special law granting to any corporation, association or individual, any special or exclusive immunity or privilege, is a guaranty that all valid enactments of the legislature shall be uniform in their operation upon persons and property, and by it all citizens are assured the equal protection of the laws. (Ill.) Jones v. Chicago etc. Ry. Co., 313.

7. **CONSTITUTIONAL LAW**—Equal Protection of Laws.—Every citizen has an equal right with every other to resort to the courts of justice for the settlement and enforcement of his rights, and a statute that makes a discrimination between different classes of litigants which is merely arbitrary in its nature is a denial of that right and of the equal protection of the law. (Ill.) Jones v. Chicago etc. Ry. Co., 313.

8. **CONSTITUTIONAL LAW**—Equal Protection of Law—Rights on Appeal.—As to cases at law in which judgment has been rendered and the right of appeal exists, a statute thereafter enacted which purports to confer a right upon the appellee which it is not possible for the appellant to enjoy, and to place a burden upon the appellant to which it is not possible that the appellee can be subjected, namely,

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the right of the appellee alone to have the facts again reviewed on appeal in case the determination in the lower court upon the facts was adverse to him, is a manifest violation of the constitution as conferring upon the appellee a special privilege and denying to the appellant an equal protection of the law. (Ill.) *Jones v. Chicago etc. Ry. Co.*, 313.

Special and Class Legislation.

9. **CONSTITUTIONAL LAW—Special Legislation.**—Laws are general and uniform when alike in their operation upon all persons in like situation, and legislation which applies only to a certain class in the community is not necessarily special legislation within the meaning of a constitutional prohibition. (Ill.) *Jones v. Chicago etc. Ry. Co.*, 313.

10. **CONSTITUTIONAL LAW—Special Legislation.**—If a law is made applicable only to one class of individuals, to be valid, there must be some actual, substantial difference between the individuals so classified and other individuals in the state or community, when considered with reference to the purposes of the law. The class upon which the benefit is conferred must be composed of individuals possessing in common some disability, attribute or qualification, or in some condition making them proper subjects in whom to vest the specific right granted them. (Ill.) *Jones v. Chicago etc. Ry. Co.*, 313.

11. **CONSTITUTIONAL LAW—Classification of Counties as Subjects of Elections for Changing County Seats.**—A statute authorizing and regulating elections for changing the location of courthouses and county seats need not apply to all the counties of the state. They may be classified according to their several needs and conditions. It would be manifestly unjust to provide for an election on the same terms and conditions in a county which has just paid large sums of money and assumed heavy obligations to build a courthouse and jail, as in a new county which had neither. (Ala.) *Ex parte Owens*, 67.

Judicial Power and Proceedings.

12. **CONSTITUTIONAL LAW—Judicial Proceedings—Necessity for Adversary Interests.**—A proceeding is not necessarily nonjudicial because it is not adversary, nor because there is not an appearance or active opposition by some defendant. (Cal.) *Robinson v. Kerrigan*, 90.

13. **CONSTITUTIONAL LAW.**—Judicial Power is not Restricted to determining controversies actually existing, but may be extended to controversies anticipated, so as to include the function of providing security against disputes and claims which may arise and protecting property and rights from possible, though at the time unknown, hostile claims and pretensions, and of declaring a status or right, and thereby forestalling and preventing controversies. (Cal.) *Robinson v. Kerrigan*, 90.

14. **CONSTITUTIONAL LAW—Statutes Operating on Remedy.**—If a statute is otherwise violative of the constitution, the mere fact that it operates directly upon the remedy, and not directly upon the right, does not remove the objection. (Ill.) *Jones v. Chicago etc. Ry. Co.*, 313.

Torrens Land Act.

15. **CONSTITUTIONAL LAW—Torrens Land Act.**—The fact that persons not named in a complaint or summons may be bound by a

decree entered under the Torrens land act, and thereby precluded from asserting their title or interest in the land, though they did not receive any notice except that afforded by the four weeks' publication prescribed by the act, and had no actual notice of the proceedings, does not render the statute unconstitutional. (Cal.) *Robinson v. Kerrigan*, 90.

16. CONSTITUTIONAL LAW—Proceedings for Establishing Title to Lands.—The state has full control over the subject and mode of establishing title to property within its limits, and for this purpose may provide a special proceeding in the nature of a proceeding in rem to fix the status of the land, and declare the nature of the titles and interests therein and the person or persons in whom such interests are at the time vested. (Cal.) *Robinson v. Kerrigan*, 90.

17. CONSTITUTIONAL LAW.—The Torrens Land Act is not Unconstitutional for devolving on the judiciary nonjudicial or merely ministerial functions. (Cal.) *Robinson v. Kerrigan*, 90.

18. CONSTITUTIONAL LAW—What is not a Judicial Function.—The fact that by the Torrens land act the registrar is required to note upon the duplicate certificates of title in his office the existence and general character of an instrument creating a lien, encumbrance, trust, power, or lease affecting the land described in the certificate does not show that he was invested with any judicial function, which can be given only to a judicial officer. (Cal.) *Robinson v. Kerrigan*, 90.

19. CONSTITUTIONAL LAW.—The Torrens Land Act is not Forbidden Legislation, because it makes special provisions regarding the statute of limitations, the rights of purchasers in good faith of lands registered under it, and other matters peculiar to lands which are brought within its provisions. (Cal.) *Robinson v. Kerrigan*, 90.

20. CONSTITUTIONAL LAW—Torrens Land Act.—The statute establishing the Torrens land system is not subject to any of the objections urged against its validity, and is constitutional. (Cal.) *Robinson v. Kerrigan*, 90.

Police Power.

21. CONSTITUTIONAL LAW—Police Power.—The state, in the exercise of its police power, has the right to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but such laws must be in fact calculated to promote those objects; otherwise they are an arbitrary restraint on the citizen, and unconstitutional. (Neb.) *Halter v. State*, 754.

22. CONSTITUTIONAL LAW—Police Power.—A state has the undoubted right, in the exercise of its police power, to legislate in the interest of the public peace, by preventing an improper use of the flag of the United States. (Neb.) *Halter v. State*, 754.

23. POLICE POWER—Patents and Trademarks.—A patent or trademark puts no restraint upon a state in the exercise of its police power, beyond the restraint imposed with respect to property generally. (Neb.) *Halter v. State*, 754.

24. POLICE POWER—Determination of What are Subjects of.—While the legislature may determine when the exigency exists for the exercise of the police power, it is for the courts to determine what are the subjects for the exercise of such power. (Ill.) *People v. Steele*, 321.

25. CONSTITUTIONAL LAW—Regulation of Business—Police Power.—To uphold a statute regulating a lawful private business,

the court must be able to see that the act tends in some degree to the prevention of offenses, or the preservation of the public health, morals, safety or welfare, and it must be apparent that such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. (Ill.) *People v. Steele*, 321.

Employment of Women.

26. CONSTITUTIONAL LAW—Women, Power to Legislate Concerning.—An adult woman is not to be regarded as a ward of the state nor in any other light than a man is regarded when the question relates to a business pursuit or calling. She is entitled to enjoy unmolested her liberty of person and her freedom to work for whom and where and as long as she pleases within the general limits operative on all persons alike. (N. Y.) *People v. Williams*, 854.

27. CONSTITUTIONAL LAW—Power to Limit Employment of Within Designated Hours.—A statute prohibiting and making criminal the employment or working of women in any factory before 6 o'clock in the morning or after 9 o'clock of the evening of any day is unconstitutional. (N. Y.) *People v. Williams*, 854.

Use of United States Flag.

28. CONSTITUTIONAL LAW—Use of United States Flag.—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for advertising purposes is valid, and not unconstitutional as abridging the privileges or immunities of the citizen, nor as depriving any person of life, liberty or property without due process of law. (Neb.) *Halter v. State*, 754.

29. UNITED STATES FLAG—Power to Prohibit Use of.—The power to prohibit the use of the United States flag does not belong exclusively to the national government, but may be exercised by a state. (Neb.) *Halter v. State*, 754.

30. CONSTITUTIONAL LAW—Use of United States Flag—Class Legislation.—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for advertising purposes is valid and not unconstitutional as special or class legislation. (Neb.) *Halter v. State*, 754.

31. CONSTITUTIONAL LAW—Use of United States Flag for Advertising Purposes.—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for advertising purposes, is not unconstitutional as operating to deprive those engaged in traffic in intoxicating liquors of their property, advertised by means of such flag, without due process of law. (Neb.) *Halter v. State*, 754.

See Animals; Carriers, 19; Courts, 2-5; Criminal Law; Elections, 6, 7; Game Laws; Gaming, 8-10; Marriage, 2; Statutes; Taxation; Theaters; Wills, 27, 28.

CONTINUANCE.

APPELLATE PRACTICE—Continuance—Discretion of Court. An application for a continuance of a case is addressed to the sound legal discretion of the trial court, and unless it appears that there has been an abuse of such discretion, the ruling on that question will be affirmed. (Neb.) *City of Lincoln v. Lincoln St. Ry. Co.*, 816.

CONTRACTS.

CONTRACTS—Public Policy.—While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught nor held invalid on a bare suspicion of illegality. (Neb.) *Stroemer v. Van Orsdel*, 713.

See Sunday.

Note.

Contracts, contingent for lobbying, 729.

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must be lawful, 727.

conflict of laws respecting, general rules controlling, 871.

CORPORATIONS.

Charter and By-laws—Change of Name.

1. **CORPORATIONS—Power to Enact By-laws.**—The inherent right to enact by-laws for the government of a corporation is in the stockholders, and this right can be exercised by a board of directors or other similar body only when such right is clearly conferred by the rules of the society and the statute of the state governing the corporation. (Neb.) *Lange v. Royal Highlanders*, 786.

2. **CORPORATIONS—Evidence of Incorporation.**—The original charter for a corporation, duly certified, is the highest evidence of the incorporation. (S. C.) *Sumter Tobacco etc. Co. v. Phoenix Assur. Co.*, 941.

3. **CORPORATIONS—Change in Name—Right to Attack for.**—An irregularity in not complying with the law in changing the name of a corporation is available only in a direct proceeding to annul its charter, instituted on behalf of the state. (S. C.) *Sumter Tobacco etc. Co. v. Phoenix Assur. Co.*, 941.

4. **CORPORATIONS—Deed to Before Charter Granted—Change in Name—Insurance—Estoppel.**—A deed to a corporation made before its charter is granted will take effect as soon as its charter is obtained, although there is a slight change in the name of the corporation from that mentioned in the deed, and an insurance company cannot raise this objection to the validity of the deed, when it has issued its policy and received its premium from a person as owner of the property. (S. C.) *Sumter Tobacco etc. Co. v. Phoenix Assur. Co.*, 941.

Pledge of Stock.

5. **CORPORATION.—A Pledgee of Corporate Stock** may invoke equitable relief against the corporation to prevent it and other parties from consummating a fraudulent sale and transfer of the assets of the company, whereby the pledged stock will be rendered worthless. (Ga.) *Andrews Co. v. National Bank*, 186.

Note by President.

6. **CORPORATION—Liability on Note Given by President.**—Where the president of a corporation obtains money from a bank, giving therefor a note signed by himself individually, and pledging as collateral security stock owned by him in the corporation, the note is his individual debt, although the money is obtained for the use of the corporation, and is placed to its credit on the books of the bank. (Ga.) *Andrews Co. v. National Bank*, 186.

Duty and Liability of Directors.

7. **CORPORATIONS—Liability of Directors for Malfeasance.**—The directors of a corporation are personally liable in equity for the consequences of their frauds or malfeasance, or for such gross negligence as amounts to a breach of trust, to the damage of the corporation or its stockholders. (Md.) *Murphy v. Penniman*, 583.

8. **CORPORATIONS—Suit Against Directors—Demurrer.**—Where the receiver of a corporation institutes a suit against the directors to hold them liable for losses due to their negligent or wrongful management of the affairs of the company, a demurrer to the whole bill will not be sustained if there is sufficient in the entire bill to require the defendants to answer, although it may contain conflicting statements and be defective in some of its parts. (Md.) *Murphy v. Penniman*, 583.

9. **CORPORATIONS—Bill Against Directors—When not Multifarious.**—A bill by the receiver of a corporation against the directors alleging that all of the defendants were connected with, or responsible for, all the acts complained of as constituting negligence and misfeasance in their management of corporate affairs, is not multifarious as joining independent matters and defendants who have no joint liability. (Md.) *Murphy v. Penniman*, 583.

10. **CORPORATIONS—Duty of Directors to Attend Meetings.**—While directors may be held liable for losses occurring through their habitual nonattendance at meetings of the board, still they are not required to attend every regular meeting, much less every special meeting. (Md.) *Murphy v. Penniman*, 583.

11. **CORPORATIONS—Duty of Directors to Attend Meetings.**—A director is not liable for what occurs at a special meeting of the board at which he was not present, unless there is evidence beyond his mere absence that connects him with the illegal acts. (Md.) *Murphy v. Penniman*, 583.

12. **CORPORATION—Negligence of Directors—Lapse of Bond.**—An allegation in a bill that each and all the directors of a corporation negligently allowed the bond of its treasurer to lapse and failed to have it renewed, whereby loss to the corporation was occasioned, requires an answer and is not open to demurrer. (Md.) *Murphy v. Penniman*, 583.

Illegal Loans—Misappropriation of Funds.

13. **CORPORATIONS—Prohibited Loan, What is not.**—Where directors of a corporation take from an officer his notes with collateral security for the amount of his defalcations, this does not constitute a loan to an officer in violation of a charter prohibition against such a loan. (Md.) *Murphy v. Penniman*, 583.

14. **CORPORATIONS—Illegal Loans by Directors.**—A Bill by the Receiver of a corporation against the directors for making illegal loans is subject to demurrer by one of the defendants who is not liable for all the loans, if it does not specify those for which he is liable. (Md.) *Murphy v. Penniman*, 583.

15. **CORPORATIONS—Liability for Illegal Loans.**—Where the charter of a corporation declares that directors who consent to a loan to an officer or employé are liable for the amount so loaned with the losses and expenses resulting therefrom, the "losses and expenses" can be recovered in equity, although not "the amount so loaned," independent of actual losses and expenses, as that would be a mere penalty. (Md.) *Murphy v. Penniman*, 583.

16. CORPORATIONS—Misappropriation of Funds.—An Allegation in a Bill that each and all of the directors of a corporation, with knowledge that an employé had misappropriated its funds, promoted him to a position of greater responsibility, which resulted in heavy losses to creditors and shareholders, is not open to demurrer by a defendant director. (Md.) *Murphy v. Penniman*, 583.

Liability for Acts of Agent—Counterfeit Stock.

17. CORPORATIONS—Liability for Acts of Agent.—A corporation, like an ordinary person, is responsible only for those acts of its agent which have been done in its name, and it is not liable for those which have been done in the agent's own individual name. (La.) *Rogers v. Southern Fiber Co.*, 537.

18. CORPORATIONS—Liability for Act of Agent—Issue of Counterfeit Stock.—If the president and local agent of a corporation, in a transaction for his individual account, delivers counterfeit instead of genuine stock of his corporation, it cannot be held liable therefor. (La.) *Rogers v. Southern Fiber Co.*, 537.

19. CORPORATIONS—Power of Agent—Issue of Counterfeit Stock.—If the president and local agent of a foreign corporation acts in its name in a fraudulent transaction, and delivers counterfeit instead of genuine stock of the corporation, and receives the money therefor, the corporation is not liable, when it did not profit by the transaction, and such agent did not have authority to receive or accept money for the corporation, and never had charge or control of, or access to, the funds of the corporation, or to its stock-books, or blank stock certificates or to its seal. (La.) *Rogers v. Southern Fiber Co.*, 537.

20. CORPORATIONS—Liability for Act of Agent—Issue of Counterfeit Stock.—If the president and local agent of a foreign corporation acts in its name in a fraudulent transaction in issuing counterfeit instead of the genuine stock of the corporation, and receives the money therefor, the corporation is not liable when such agent did not have authority to issue the genuine stock of the company, and was not held out by it to the public as having any such authority, and was not in the habit of receiving subscriptions for stock, or of dealing in any way with the certificates of stock of the company, or of receiving money in its name, or for its account. (La.) *Rogers v. Southern Fiber Co.*, 537.

21. CORPORATIONS—Act of Officer—Issue of Counterfeit Stock. Before a corporation can be made liable in any way for the act of its officer in issuing counterfeit stock, the officer must be shown to have had authority to issue genuine stock. (La.) *Rogers v. Southern Fiber Co.*, 537.

22. CORPORATIONS—Implied Power of President—Issue of Counterfeit Stock.—The president of a corporation has not, simply by virtue of his office, the implied power of binding his corporation by a fraudulent and counterfeit issue of its stock, or by receiving money in its name to be invested in its stock. (La.) *Rogers v. Southern Fiber Co.*, 537.

See Physicians and Surgeons, 3, 4.

Note.

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- pledgee of, right of to vote at corporate elections, 196.
- pledgee of, sales by, when must be public, 203.
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- pledgee of, suits in equity to restrain from voting, 196.
- pledgor of, right of to vote at corporate elections, 196.
- pledgor of, suits which may maintain in equity, 195, 196.

COUNTIES.

1. **COUNTIES.**—The Fiscal Policy of Counties prescribed and enjoined by the constitution of Georgia is, that all lawful liabilities must be paid out of the revenues raised for the year in which the liabilities are incurred. No departure from this course is allowable except in case of loans to supply a casual deficiency of revenue, and in case of debts created by authority of a previous plebiscite note. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

2. **COUNTIES—Power to Borrow Money.**—While it is permissible for a county with an empty treasury to incur a liability for a current expense, to be discharged from the funds raised by taxation during the current year, and yet not create a debt within the meaning of the constitutional inhibition, it does not follow that a contract for the loan of money to pay such liability is not such a debt. There is a fundamental difference between incurring a liability to one person and borrowing money from another to pay it. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

3. **COUNTIES—Borrowing Money for Current Expenses.**—County officials have no authority to contract for a loan to defray current expenses of the county, although the loan is contracted to be paid in the current year, and is made with the understanding that it shall be paid from the anticipated revenues of that year. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

4. **COUNTIES—Liability for Unauthorized Debts.**—Where county officials borrow money in the face of a constitutional inhibition, but

apply it beneficially to authorized municipal purposes, the county is liable to the lender as for money had and received. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

5. COUNTIES—Liability for Unauthorized Debts.—Where the constitution of a state forbids not only the borrowing of money by a county but also the incurring of the liability which is discharged by the money borrowed, the lender is without remedy against the county to recover his money in any form of action. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

6. COUNTIES—Unauthorized Loan—Subrogation.—Where a county issues a warrant to pay a lawful liability incurred for current expenses, and thereafter procures another to pay it out of a loan that he makes to the county, the lender, upon a disaffirmance by the county of the illegal loan, is subrogated to the rights of the warrant-holder. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

7. COUNTIES—Enjoining Payment of Warrants.—When the legality of a portion of county warrants contending for payment is in issue, and the warrants aggregate an amount in excess of the sum in the treasury raised from the revenues of the year in which the liabilities were incurred, equity will, by injunction, impound the fund in the hands of the treasurer until it is judicially ascertained to whom and in what proportions the fund should be appropriated. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

COURTS.

1. THE JURISDICTION of the Appellate Court is Acquired by the filing of a notice of appeal in the trial court, and is not destroyed or suspended by the loss or destruction of the transcript on appeal after it is filed. (Cal.) *Estate of Davis*, 105.

2. CONSTITUTIONAL LAW—Jurisdiction of Courts.—A constitutional provision that the legislature has no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, is intended simply to preserve to the judicial department the right and power to finally determine controversies between parties involving their rights and upon whose claims some decision or judgment must be rendered, or determination made. (Idaho) *McKnight v. Grant*, 287.

3. THE JURISDICTION of the Probate Court When Dealing with Probate Matters is that of a court of general jurisdiction, and the same presumptions attach to its acts as in any other proceeding of which it has jurisdiction. (Cal.) *Estate of Davis*, 105.

4. CONSTITUTIONAL LAW—Jurisdiction of Probate Courts.—A statute authorizing a probate court to make an order for the publication of summons upon a showing of certain facts by affidavit is not unconstitutional as authorizing a probate judge to make the order for publication in a case not pending in his court, but in the district court in a case involving a sum or controversy over which the probate court has no jurisdiction. (Idaho) *McKnight v. Grant*, 287.

5. CONSTITUTIONAL LAW—Jurisdiction of Probate Courts—Order for Publication of Summons.—Under a constitutional provision that the legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, the legislature has authority to confer upon a probate court the power to make orders for publication of summons in cases pending in other courts. (Idaho) *McKnight v. Grant*, 287.

COVENANTS.

1. COVENANT TO MAINTAIN WALL—When Runs with Land. A covenant in a deed of a right of way for a railroad that as part consideration for the conveyance the grantee shall erect a retaining wall between the grantor's land and the right of way, keep it in repair at all times, and renew it when necessary, runs with the land. (Ky.) *Flege v. Covington etc. Bridge Co.*, 463.

2. COVENANT TO MAINTAIN WALL—Limitation of Action for Breach.—A covenant to keep a retaining wall in repair at all times, and to renew it when necessary, is a continuing contract not affected by the statute of limitations until after the covenantor refuses to repair or renew as the case may be. The fact that in the first instance he constructed the wall of wood, instead of stone as covenanted for, does not set the statute in motion. (Ky.) *Flege v. Covington etc. Bridge Co.*, 463.

3. COVENANT TO MAINTAIN WALL—Estoppel Against Covenantee.—The fact that a grantor of a right of way acquiesces in the grantee building a retaining wall of wood, instead of stone as covenanted for in the deed, does not estop him from demanding a stone wall when the grantee removes the wooden one. (Ky.) *Flege v. Covington etc. Bridge Co.*, 463.

4. COVENANT TO MAINTAIN WALL—Specific Performance.—A covenant in a deed of a railroad right of way that the grantee shall erect a retaining wall between the grantor's land and the right of way, keep it in repair at all times, and renew it when necessary, may be specifically enforced. (Ky.) *Flege v. Covington etc. Bridge Co.*, 463.

CRIMINAL LAW.

1. CRIMINAL LAW—Trial—Presence of Judge.—In criminal cases the trial judge must be present in the courtroom during the whole trial, and if he absents himself without the consent of the defendant, it is error, which may call for a reversal of the case. (Neb.) *Powers v. State*, 801.

2. CRIMINAL LAW—Misconduct of Bystander.—Manifestations of grief or sympathetic expressions in court, by spectators related to the accused or the deceased in a criminal trial do not furnish good ground for a mistrial and the discharge of the jury, especially when the offending person is rebuked and the jury instructed to disregard the incident, and not to permit it to influence them in any manner. (La.) *State v. Wimby*, 507.

3. TRIAL—Misconduct of Counsel.—If the appellate court is satisfied that prejudice to the defendant resulted from misconduct of counsel in the argument of the case, it constitutes reversible error. (Neb.) *Powers v. State*, 801.

4. CRIMINAL LAW—Refusal to Testify as Evidence of Guilt—Misconduct of Counsel.—The refusal of a witness to testify, because such testimony might be used in a criminal prosecution against him or her, or because it would subject him or her to humiliation and disgrace, is not a fact or circumstance which may be considered as tending to prove the guilt of the defendant on trial, and the statement of the prosecuting attorney in his argument to the jury that such refusal to testify is evidence of such guilt is prejudicial and reversible error. (Neb.) *Powers v. State*, 801.

5. CRIMINAL LAW—Admissions as Evidence of Guilt.—If admissions of his guilt are made by an accused under such circumstances of apparent peril and bodily danger as to make them inadmissible in

evidence, declarations of witnesses made to the defendant at a later date to the effect that he did make such admissions cannot be used as evidence against him. (Neb.) *Powers v. State*, 801.

6. CRIMINAL LAW—Confessions as Evidence.—One cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof aliunde of the essential facts constituting the crime. (Neb.) *Blacker v. State*, 751.

7. CONSTITUTIONAL LAW—Privilege of not Answering Incriminating Questions is Personal.—That a witness was improperly compelled to answer, and did answer, incriminating questions, against the objection of the defendant in a criminal prosecution, cannot be urged by such defendant in the appellate court. (Ala.) *Beauvoir Club v. State*, 82.

Note.

Criminal Law, trial, applause by spectators at, 511.

trial, applause, failure to warn jury after, 511, 512.

trial, duty of court when spectators applaud or show approval or disapproval, 511, 512.

trial, manifestations of grief or emotion by spectators, 515, 516.

trial, misconduct of spectators at as a ground for new trial, 511.

trial, misconduct of spectators, new trial because of, 513.

trial, misconduct or applause of spectators, duty to object to, and to call for a reprimand, 512.

trial, prejudice to the defendant, when presumed from misconduct or applause of spectators, 513.

trial, remarks of spectators at, when warrant the granting of a new trial, 514, 515.

trial, spectators, improper remarks of at, when sufficient ground for a new trial, 514.

Criminal Trials, discretion of the judge presiding at, 807, 808.

judges presiding at, duties of to keep attorneys within the facts, 808.

prejudice presumed from improper arguments to the jury, 809.

prosecuting attorneys, arguments by not based on evidence, 807-809.

prosecuting attorneys, arguments, latitude allowed in, 807, 808.

prosecuting attorneys, duties of to be fair and impartial, 806, 807.

prosecuting attorneys, prejudice occasioned by in asking questions not admissible, 807.

witnesses, refusal of to testify is not evidence of the guilt of the person on trial, 809, 810.

DAMAGES.

1. DAMAGES.—For Bodily Pain and Suffering of a Wife endured because of a wrongful act of another she may recover, though no physical violence was done to her person. (Ala.) *Engle v. Simmons*, 59.

2. DAMAGES—Verdict—Computation.—If a statute allows the successful party to recover a sum which is determined by multiplying the actual damages sustained a specified number of times, it is immaterial whether the jury return in their verdict the sum which the plaintiff is entitled to recover by virtue of the statute, or whether they return the actual damages, and the court directs the judgment

the right of the appellee alone to have the facts again reviewed on appeal in case the determination in the lower court upon the facts was adverse to him, is a manifest violation of the constitution as conferring upon the appellee a special privilege and denying to the appellant an equal protection of the law. (Ill.) *Jones v. Chicago etc. Ry. Co.*, 313.

Special and Class Legislation.

9. **CONSTITUTIONAL LAW—Special Legislation.**—Laws are general and uniform when alike in their operation upon all persons in like situation, and legislation which applies only to a certain class in the community is not necessarily special legislation within the meaning of a constitutional prohibition. (Ill.) *Jones v. Chicago etc. Ry. Co.*, 313.

10. **CONSTITUTIONAL LAW—Special Legislation.**—If a law is made applicable only to one class of individuals, to be valid, there must be some actual, substantial difference between the individuals so classified and other individuals in the state or community, when considered with reference to the purposes of the law. The class upon which the benefit is conferred must be composed of individuals possessing in common some disability, attribute or qualification, or in some condition making them proper subjects in whom to vest the specific right granted them. (Ill.) *Jones v. Chicago etc. Ry. Co.*, 313.

11. **CONSTITUTIONAL LAW—Classification of Counties as Subjects of Elections for Changing County Seats.**—A statute authorizing and regulating elections for changing the location of courthouses and county seats need not apply to all the counties of the state. They may be classified according to their several needs and conditions. It would be manifestly unjust to provide for an election on the same terms and conditions in a county which has just paid large sums of money and assumed heavy obligations to build a courthouse and jail, as in a new county which had neither. (Ala.) *Ex parte Owens*, 67.

Judicial Power and Proceedings.

12. **CONSTITUTIONAL LAW—Judicial Proceedings—Necessity for Adversary Interests.**—A proceeding is not necessarily nonjudicial because it is not adversary, nor because there is not an appearance or active opposition by some defendant. (Cal.) *Robinson v. Kerrigan*, 90.

13. **CONSTITUTIONAL LAW.**—Judicial Power is not Restricted to determining controversies actually existing, but may be extended to controversies anticipated, so as to include the function of providing security against disputes and claims which may arise and protecting property and rights from possible, though at the time unknown, hostile claims and pretensions, and of declaring a status or right, and thereby forestalling and preventing controversies. (Cal.) *Robinson v. Kerrigan*, 90.

14. **CONSTITUTIONAL LAW—Statutes Operating on Remedy.**—If a statute is otherwise violative of the constitution, the mere fact that it operates directly upon the remedy, and not directly upon the right, does not remove the objection. (Ill.) *Jones v. Chicago etc. Ry. Co.*, 313.

Torrens Land Act.

15. **CONSTITUTIONAL LAW—Torrens Land Act.**—The fact that persons not named in a complaint or summons may be bound by a

decree entered under the Torrens land act, and thereby precluded from asserting their title or interest in the land, though they did not receive any notice except that afforded by the four weeks' publication prescribed by the act, and had no actual notice of the proceedings, does not render the statute unconstitutional. (Cal.) *Robinson v. Kerrigan*, 90.

16. **CONSTITUTIONAL LAW—Proceedings for Establishing Title to Lands.**—The state has full control over the subject and mode of establishing title to property within its limits, and for this purpose may provide a special proceeding in the nature of a proceeding in rem to fix the status of the land, and declare the nature of the titles and interests therein and the person or persons in whom such interests are at the time vested. (Cal.) *Robinson v. Kerrigan*, 90.

17. **CONSTITUTIONAL LAW.—The Torrens Land Act is not Unconstitutional** for devolving on the judiciary nonjudicial or merely ministerial functions. (Cal.) *Robinson v. Kerrigan*, 90.

18. **CONSTITUTIONAL LAW—What is not a Judicial Function.**—The fact that by the Torrens land act the registrar is required to note upon the duplicate certificates of title in his office the existence and general character of an instrument creating a lien, encumbrance, trust, power, or lease affecting the land described in the certificate does not show that he was invested with any judicial function, which can be given only to a judicial officer. (Cal.) *Robinson v. Kerrigan*, 90.

19. **CONSTITUTIONAL LAW.—The Torrens Land Act is not Forbidden Legislation**, because it makes special provisions regarding the statute of limitations, the rights of purchasers in good faith of lands registered under it, and other matters peculiar to lands which are brought within its provisions. (Cal.) *Robinson v. Kerrigan*, 90.

20. **CONSTITUTIONAL LAW—Torrens Land Act.**—The statute establishing the Torrens land system is not subject to any of the objections urged against its validity, and is constitutional. (Cal.) *Robinson v. Kerrigan*, 90.

Police Power.

21. **CONSTITUTIONAL LAW—Police Power.**—The state, in the exercise of its police power, has the right to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but such laws must be in fact calculated to promote those objects; otherwise they are an arbitrary restraint on the citizen, and unconstitutional. (Neb.) *Halter v. State*, 754.

22. **CONSTITUTIONAL LAW—Police Power.**—A state has the undoubted right, in the exercise of its police power, to legislate in the interest of the public peace, by preventing an improper use of the flag of the United States. (Neb.) *Halter v. State*, 754.

23. **POLICE POWER—Patents and Trademarks.**—A patent or trademark puts no restraint upon a state in the exercise of its police power, beyond the restraint imposed with respect to property generally. (Neb.) *Halter v. State*, 754.

24. **POLICE POWER—Determination of What are Subjects of.**—While the legislature may determine when the exigency exists for the exercise of the police power, it is for the courts to determine what are the subjects for the exercise of such power. (Ill.) *People v. Steele*, 321.

25. **CONSTITUTIONAL LAW—Regulation of Business—Police Power.**—To uphold a statute regulating a lawful private business,

the court must be able to see that the act tends in some degree to the prevention of offenses, or the preservation of the public health, morals, safety or welfare, and it must be apparent that such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. (Ill.) *People v. Steele*, 321.

Employment of Women.

26. **CONSTITUTIONAL LAW—Women, Power to Legislate Concerning.**—An adult woman is not to be regarded as a ward of the state nor in any other light than a man is regarded when the question relates to a business pursuit or calling. She is entitled to enjoy unmolested her liberty of person and her freedom to work for whom and where and as long as she pleases within the general limits operative on all persons alike. (N. Y.) *People v. Williams*, 854.

27. **CONSTITUTIONAL LAW—Power to Limit Employment of Within Designated Hours.**—A statute prohibiting and making criminal the employment or working of women in any factory before 6 o'clock in the morning or after 9 o'clock of the evening of any day is unconstitutional. (N. Y.) *People v. Williams*, 854.

Use of United States Flag.

28. **CONSTITUTIONAL LAW—Use of United States Flag.**—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for advertising purposes is valid, and not unconstitutional as abridging the privileges or immunities of the citizen, nor as depriving any person of life, liberty or property without due process of law. (Neb.) *Halter v. State*, 754.

29. **UNITED STATES FLAG—Power to Prohibit Use of.**—The power to prohibit the use of the United States flag does not belong exclusively to the national government, but may be exercised by a state. (Neb.) *Halter v. State*, 754.

30. **CONSTITUTIONAL LAW—Use of United States Flag—Class Legislation.**—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for advertising purposes is valid and not unconstitutional as special or class legislation. (Neb.) *Halter v. State*, 754.

31. **CONSTITUTIONAL LAW—Use of United States Flag for Advertising Purposes.**—A statute to prevent and punish the desecration of the flag of the United States and to prevent its use for advertising purposes, is not unconstitutional as operating to deprive those engaged in traffic in intoxicating liquors of their property, advertised by means of such flag, without due process of law. (Neb.) *Halter v. State*, 754.

See Animals; Carriers, 19; Courts, 2-5; Criminal Law; Elections, 6, 7; Game Laws; Gaming, 8-10; Marriage, 2; Statutes; Taxation; Theaters; Wills, 27, 28.

CONTINUANCE.

APPELLATE PRACTICE—Continuance—Discretion of Court. An application for a continuance of a case is addressed to the sound legal discretion of the trial court, and unless it appears that there has been an abuse of such discretion, the ruling on that question will be affirmed. (Neb.) *City of Lincoln v. Lincoln St. Ry. Co.*, 816.

CONTRACTS.

CONTRACTS—Public Policy.—While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught nor held invalid on a bare suspicion of illegality. (Neb.) *Stroemer v. Van Orsdel*, 713.

See Sunday.

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Contracts, contingent for lobbying, 729.

for lobbying, when illegal and when valid, 726, 727.

must be lawful, 727.

conflict of laws respecting, general rules controlling, 871.

CORPORATIONS.

Charter and By-laws—Change of Name.

1. **CORPORATIONS—Power to Enact By-laws.**—The inherent right to enact by-laws for the government of a corporation is in the stockholders, and this right can be exercised by a board of directors or other similar body only when such right is clearly conferred by the rules of the society and the statute of the state governing the corporation. (Neb.) *Lange v. Royal Highlanders*, 786.

2. **CORPORATIONS—Evidence of Incorporation.**—The original charter for a corporation, duly certified, is the highest evidence of the incorporation. (S. C.) *Sumter Tobacco etc. Co. v. Phoenix Assur. Co.*, 941.

3. **CORPORATIONS—Change in Name—Right to Attack for.**—An irregularity in not complying with the law in changing the name of a corporation is available only in a direct proceeding to annul its charter, instituted on behalf of the state. (S. C.) *Sumter Tobacco etc. Co. v. Phoenix Assur. Co.*, 941.

4. **CORPORATIONS—Deed to Before Charter Granted—Change in Name—Insurance—Estoppel.**—A deed to a corporation made before its charter is granted will take effect as soon as its charter is obtained, although there is a slight change in the name of the corporation from that mentioned in the deed, and an insurance company cannot raise this objection to the validity of the deed, when it has issued its policy and received its premium from a person as owner of the property. (S. C.) *Sumter Tobacco etc. Co. v. Phoenix Assur. Co.*, 941.

Pledge of Stock.

5. **CORPORATION.—A Pledgee of Corporate Stock** may invoke equitable relief against the corporation to prevent it and other parties from consummating a fraudulent sale and transfer of the assets of the company, whereby the pledged stock will be rendered worthless. (Ga.) *Andrews Co. v. National Bank*, 186.

Note by President.

6. **CORPORATION—Liability on Note Given by President.**—Where the president of a corporation obtains money from a bank, giving therefor a note signed by himself individually, and pledging as collateral security stock owned by him in the corporation, the note is his individual debt, although the money is obtained for the use of the corporation, and is placed to its credit on the books of the bank. (Ga.) *Andrews Co. v. National Bank*, 186.

Duty and Liability of Directors.

7. CORPORATIONS—Liability of Directors for Malfeasance.—The directors of a corporation are personally liable in equity for the consequences of their frauds or malfeasance, or for such gross negligence as amounts to a breach of trust, to the damage of the corporation or its stockholders. (Md.) *Murphy v. Penniman*, 583.

8. CORPORATIONS—Suit Against Directors—Demurrer.—Where the receiver of a corporation institutes a suit against the directors to hold them liable for losses due to their negligent or wrongful management of the affairs of the company, a demurrer to the whole bill will not be sustained if there is sufficient in the entire bill to require the defendants to answer, although it may contain conflicting statements and be defective in some of its parts. (Md.) *Murphy v. Penniman*, 583.

9. CORPORATIONS—Bill Against Directors—When not Multifarious.—A bill by the receiver of a corporation against the directors alleging that all of the defendants were connected with, or responsible for, all the acts complained of as constituting negligence and misfeasance in their management of corporate affairs, is not multifarious as joining independent matters and defendants who have no joint liability. (Md.) *Murphy v. Penniman*, 583.

10. CORPORATIONS—Duty of Directors to Attend Meetings.—While directors may be held liable for losses occurring through their habitual nonattendance at meetings of the board, still they are not required to attend every regular meeting, much less every special meeting. (Md.) *Murphy v. Penniman*, 583.

11. CORPORATIONS—Duty of Directors to Attend Meetings.—A director is not liable for what occurs at a special meeting of the board at which he was not present, unless there is evidence beyond his mere absence that connects him with the illegal acts. (Md.) *Murphy v. Penniman*, 583.

12. CORPORATION—Negligence of Directors—Lapse of Bond.—An allegation in a bill that each and all the directors of a corporation negligently allowed the bond of its treasurer to lapse and failed to have it renewed, whereby loss to the corporation was occasioned, requires an answer and is not open to demurrer. (Md.) *Murphy v. Penniman*, 583.

Illegal Loans—Misappropriation of Funds.

13. CORPORATIONS—Prohibited Loan, What is not.—Where directors of a corporation take from an officer his notes with collateral security for the amount of his defalcations, this does not constitute a loan to an officer in violation of a charter prohibition against such a loan. (Md.) *Murphy v. Penniman*, 583.

14. CORPORATIONS—Illegal Loans by Directors.—A Bill by the Receiver of a corporation against the directors for making illegal loans is subject to demurrer by one of the defendants who is not liable for all the loans, if it does not specify those for which he is liable. (Md.) *Murphy v. Penniman*, 583.

15. CORPORATIONS—Liability for Illegal Loans.—Where the charter of a corporation declares that directors who consent to a loan to an officer or employé are liable for the amount so loaned with the losses and expenses resulting therefrom, the "losses and expenses" can be recovered in equity, although not "the amount so loaned," independent of actual losses and expenses, as that would be a mere penalty. (Md.) *Murphy v. Penniman*, 583.

16. CORPORATIONS—Misappropriation of Funds.—An Allegation in a Bill that each and all of the directors of a corporation, with knowledge that an employé had misappropriated its funds, promoted him to a position of greater responsibility, which resulted in heavy losses to creditors and shareholders, is not open to demurrer by a defendant director. (Md.) *Murphy v. Penniman*, 583.

Liability for Acts of Agent—Counterfeit Stock.

17. CORPORATIONS—Liability for Acts of Agent.—A corporation, like an ordinary person, is responsible only for those acts of its agent which have been done in its name, and it is not liable for those which have been done in the agent's own individual name. (La.) *Rogers v. Southern Fiber Co.*, 537.

18. CORPORATIONS—Liability for Act of Agent—Issue of Counterfeit Stock.—If the president and local agent of a corporation, in a transaction for his individual account, delivers counterfeit instead of genuine stock of his corporation, it cannot be held liable therefor. (La.) *Rogers v. Southern Fiber Co.*, 537.

19. CORPORATIONS—Power of Agent—Issue of Counterfeit Stock.—If the president and local agent of a foreign corporation acts in its name in a fraudulent transaction, and delivers counterfeit instead of genuine stock of the corporation, and receives the money therefor, the corporation is not liable, when it did not profit by the transaction, and such agent did not have authority to receive or accept money for the corporation, and never had charge or control of, or access to, the funds of the corporation, or to its stock-books, or blank stock certificates or to its seal. (La.) *Rogers v. Southern Fiber Co.*, 537.

20. CORPORATIONS—Liability for Act of Agent—Issue of Counterfeit Stock.—If the president and local agent of a foreign corporation acts in its name in a fraudulent transaction in issuing counterfeit instead of the genuine stock of the corporation, and receives the money therefor, the corporation is not liable when such agent did not have authority to issue the genuine stock of the company, and was not held out by it to the public as having any such authority, and was not in the habit of receiving subscriptions for stock, or of dealing in any way with the certificates of stock of the company, or of receiving money in its name, or for its account. (La.) *Rogers v. Southern Fiber Co.*, 537.

21. CORPORATIONS—Act of Officer—Issue of Counterfeit Stock. Before a corporation can be made liable in any way for the act of its officer in issuing counterfeit stock, the officer must be shown to have had authority to issue genuine stock. (La.) *Rogers v. Southern Fiber Co.*, 537.

22. CORPORATIONS—Implied Power of President—Issue of Counterfeit Stock.—The president of a corporation has not, simply by virtue of his office, the implied power of binding his corporation by a fraudulent and counterfeit issue of its stock, or by receiving money in its name to be invested in its stock. (La.) *Rogers v. Southern Fiber Co.*, 537.

See Physicians and Surgeons, 3, 4.

Note.

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- Corporate Stock**, pledgee of, demand for payment, and notice of sale, what contracts exonerate from giving, 202, 203.
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- pledgee of, dividends, suits by to recover, 197.
- pledgee of, foreclosure by, 205.
- pledgee of, interest of therein, 195.
- pledgee of, liability of for assessments, 199.
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- pledgee of, remedies of, 200-205.
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- pledgee of, right of to sell the stock, 201.
- pledgee of, right of to vote at corporate elections, 196.
- pledgee of, sales by, when must be public, 203.
- pledgee of, sales by without notice, 201.
- pledgee of, suits by in equity to prevent misappropriation of assets, 195.
- pledgee of, suits in equity to restrain from voting, 196.
- pledgor of, right of to vote at corporate elections, 196.
- pledgor of, suits which may maintain in equity, 195, 196.

COUNTIES.

1. **COUNTIES.**—The Fiscal Policy of Counties prescribed and enjoined by the constitution of Georgia is, that all lawful liabilities must be paid out of the revenues raised for the year in which the liabilities are incurred. No departure from this course is allowable except in case of loans to supply a casual deficiency of revenue, and in case of debts created by authority of a previous plebiscite note. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

2. **COUNTIES—Power to Borrow Money.**—While it is permissible for a county with an empty treasury to incur a liability for a current expense, to be discharged from the funds raised by taxation during the current year, and yet not create a debt within the meaning of the constitutional inhibition, it does not follow that a contract for the loan of money to pay such liability is not such a debt. There is a fundamental difference between incurring a liability to one person and borrowing money from another to pay it. (Ga.) *Butts County v. Jackson Banking Co.*, 244.

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COURTS.

1. THE JURISDICTION of the Appellate Court is Acquired by the filing of a notice of appeal in the trial court, and is not destroyed or suspended by the loss or destruction of the transcript on appeal after it is filed. (Cal.) *Estate of Davis*, 105.

2. CONSTITUTIONAL LAW—Jurisdiction of Courts.—A constitutional provision that the legislature has no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, is intended simply to preserve to the judicial department the right and power to finally determine controversies between parties involving their rights and upon whose claims some decision or judgment must be rendered, or determination made. (Idaho) *McKnight v. Grant*, 287.

3. THE JURISDICTION of the Probate Court When Dealing with Probate Matters is that of a court of general jurisdiction, and the same presumptions attach to its acts as in any other proceeding of which it has jurisdiction. (Cal.) *Estate of Davis*, 105.

4. CONSTITUTIONAL LAW—Jurisdiction of Probate Courts.—A statute authorizing a probate court to make an order for the publication of summons upon a showing of certain facts by affidavit is not unconstitutional as authorizing a probate judge to make the order for publication in a case not pending in his court, but in the district court in a case involving a sum or controversy over which the probate court has no jurisdiction. (Idaho) *McKnight v. Grant*, 287.

5. CONSTITUTIONAL LAW—Jurisdiction of Probate Courts—Order for Publication of Summons.—Under a constitutional provision that the legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, the legislature has authority to confer upon a probate court the power to make orders for publication of summons in cases pending in other courts. (Idaho) *McKnight v. Grant*, 287.

COVENANTS.

1. COVENANT TO MAINTAIN WALL—When Runs with Land. A covenant in a deed of a right of way for a railroad that as part consideration for the conveyance the grantee shall erect a retaining wall between the grantor's land and the right of way, keep it in repair at all times, and renew it when necessary, runs with the land. (Ky.) *Flege v. Covington etc. Bridge Co.*, 463.

2. COVENANT TO MAINTAIN WALL—Limitation of Action for Breach.—A covenant to keep a retaining wall in repair at all times, and to renew it when necessary, is a continuing contract not affected by the statute of limitations until after the covenantor refuses to repair or renew as the case may be. The fact that in the first instance he constructed the wall of wood, instead of stone as covenanted for, does not set the statute in motion. (Ky.) *Flege v. Covington etc. Bridge Co.*, 463.

3. COVENANT TO MAINTAIN WALL—Estoppel Against Covenantor.—The fact that a grantor of a right of way acquiesces in the grantee building a retaining wall of wood, instead of stone as covenanted for in the deed, does not estop him from demanding a stone wall when the grantee removes the wooden one. (Ky.) *Flege v. Covington etc. Bridge Co.*, 463.

4. COVENANT TO MAINTAIN WALL—Specific Performance.—A covenant in a deed of a railroad right of way that the grantee shall erect a retaining wall between the grantor's land and the right of way, keep it in repair at all times, and renew it when necessary, may be specifically enforced. (Ky.) *Flege v. Covington etc. Bridge Co.*, 463.

CRIMINAL LAW.

1. CRIMINAL LAW—Trial—Presence of Judge.—In criminal cases the trial judge must be present in the courtroom during the whole trial, and if he absents himself without the consent of the defendant, it is error, which may call for a reversal of the case. (Neb.) *Powers v. State*, 801.

2. CRIMINAL LAW—Misconduct of Bystander.—Manifestations of grief or sympathetic expressions in court, by spectators related to the accused or the deceased in a criminal trial do not furnish good ground for a mistrial and the discharge of the jury, especially when the offending person is rebuked and the jury instructed to disregard the incident, and not to permit it to influence them in any manner. (La.) *State v. Wimby*, 507.

3. TRIAL—Misconduct of Counsel.—If the appellate court is satisfied that prejudice to the defendant resulted from misconduct of counsel in the argument of the case, it constitutes reversible error. (Neb.) *Powers v. State*, 801.

4. CRIMINAL LAW—Refusal to Testify as Evidence of Guilt—Misconduct of Counsel.—The refusal of a witness to testify, because such testimony might be used in a criminal prosecution against him or her, or because it would subject him or her to humiliation and disgrace, is not a fact or circumstance which may be considered as tending to prove the guilt of the defendant on trial, and the statement of the prosecuting attorney in his argument to the jury that such refusal to testify is evidence of such guilt is prejudicial and reversible error. (Neb.) *Powers v. State*, 801.

5. CRIMINAL LAW—Admissions as Evidence of Guilt.—If admissions of his guilt are made by an accused under such circumstances of apparent peril and bodily danger as to make them inadmissible in

evidence, declarations of witnesses made to the defendant at a later date to the effect that he did make such admissions cannot be used as evidence against him. (Neb.) *Powers v. State*, 801.

6. CRIMINAL LAW—Confessions as Evidence.—One cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof aliunde of the essential facts constituting the crime. (Neb.) *Blacker v. State*, 751.

7. CONSTITUTIONAL LAW—Privilege of not Answering Incriminating Questions is Personal.—That a witness was improperly compelled to answer, and did answer, incriminating questions, against the objection of the defendant in a criminal prosecution, cannot be urged by such defendant in the appellate court. (Ala.) *Beauvoir Club v. State*, 82.

Note.

Criminal Law, trial, applause by spectators at, 511.

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DAMAGES.

1. DAMAGES.—For Bodily Pain and Suffering of a Wife endured because of a wrongful act of another she may recover, though no physical violence was done to her person. (Ala.) *Engle v. Simmons*, 59.

2. DAMAGES—Verdict—Computation.—If a statute allows the successful party to recover a sum which is determined by multiplying the actual damages sustained a specified number of times, it is immaterial whether the jury return in their verdict the sum which the plaintiff is entitled to recover by virtue of the statute, or whether they return the actual damages, and the court directs the judgment

to be entered in accordance with the statute. (Colo.) *Richards v. Sanderson*, 167.

DEEDS.

1. **DEED—Omission of Grantor's Name.**—A deed signed by the grantor is operative, though his name is omitted from the body of the instrument. (Ga.) *Sterling v. Park*, 224.

2. **DEED, Delivery of to a Third Person for the Grantee.**—A grantor may deliver a deed to a third person to be held until the grantor's death, and then delivered to the grantee, and such original delivery is good and vests title in the grantee, if there is no reservation of the right of the grantor to avoid or resume possession of the instrument. (Ala.) *Griswold v. Griswold*, 64.

3. **DEEDS—Warranty of Existence of Street.**—The fact that a deed describes the land as bounded by a certain street or alley raises no implied warranty that such street or alley exists, if the grantor is not the owner of the soil therein. (Tenn.) *Fulmer v. Bates*, 1059.

4. **DEEDS—Acknowledgment—Residence.**—A statute providing that the "place of residence" of the grantor in a deed be stated in the certificate of acknowledgment is directory merely. Hence the acknowledgment is sufficient although the grantor's residence is not stated. (Mo.) *Gross v. Watts*, 662.

5. **DEEDS—Acknowledgment—"Free Act and Deed."**—If a certificate of acknowledgment of a deed recites that the grantor "duly acknowledged the execution of the same," the acknowledgment is sufficient, although it does not recite that the deed was executed as the grantor's "free act and deed." The statute relating to the latter clause is directory and not mandatory. (Mo.) *Gross v. Watts*, 662.

6. **DEEDS—Forged—Effect of Notice and Knowledge.**—If a grantee takes a deed for land from a grantor whose title is known to the former to rest in an erased, mutilated and forged deed, the grantee takes no interest in the land, whether the forged deed was recorded or not, or whether it was outside the chain of title or not. (Mo.) *Gross v. Watts*, 662.

7. **DEEDS, FORGED.**—One can acquire no interest in land through a forged deed, whether or not he has notice of the forgery. (Mo.) *Gross v. Watts*, 662.

See Covenants; Executors and Administrators, 7-9; Wills, 4, 5.

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DESCENT AND DISTRIBUTION.

DESCENT AND DISTRIBUTION—Estoppel Against Heirs.—Brothers and sisters, by renouncing the succession of a deceased brother in favor of their mother, do not thereby estop themselves from contesting the right of the children of such brother to share in the mother's estate. (La.) *Succession of Gabisso*, 529.

DIVORCE.

In General.

1. **DIVORCE—Adultery—Identification of Accomplice.**—If a petition for divorce charges adultery between the defendant and a named

accomplice as the sole ground therefor, and the judgment of final divorce recites that it was rendered after due proof, although the evidence is not preserved, the identification of the accomplice is sufficient for the purposes of a statute prohibiting and declaring null marriage between a person divorced for adultery and his or her accomplice therein. (La.) Succession of Gabisso, 529.

2. **DIVORCE—Appeal—Desertion.**—A decree of divorce granted upon the ground of desertion is properly reversed where the record fails to show that the desertion was willful, or without reasonable cause, as required by the statute. (Ill.) Chatterton v. Chatterton, 339.

3. **DIVORCE—Appeal by Writ of Error—Laches.**—Upon a writ of error to review a decree of divorce, the defense or doctrine of laches does not apply, as the statute fixes the period within which the writ may be sued out. (Ill.) Chatterton v. Chatterton, 339.

4. **DIVORCE—Jurisdiction—Division of Real Estate.**—Courts have no power or jurisdiction in a divorce proceeding to divide or apportion the real estate of the parties, unless given such power by statute, and if they attempt to act in excess of the powers therein granted, their action is void and subject to collateral attack. (Neb.) Fall v. Fall, 767.

5. **MARRIAGE AND DIVORCE—Right of Husband to Wife's Choses.**—The fact that a husband reduces to his possession a note belonging to his wife gives him no property rights in it, and the fact that he disposes of it before she obtains a divorce does not prevent her from thereafter recovering it or its equivalent from him. (Ky.) Johnson v. Johnson's Committee, 449.

6. **CONTRACT—Transaction to Facilitate Divorce.**—An agreement by a wife to confirm a gift of a note to her husband if he will not oppose her action for a divorce is void, and does not affect her right to recover the note or the amount of it. (Ky.) Johnson v. Johnson's Committee, 449.

Custody of Children.

7. **DIVORCE—Custody of Children.**—In awarding the custody of a child to one of the parents in a divorce proceeding, the good of the child is the primary object, and due regard must be had as to the character and conduct of the parties in awarding the custody of the child. (Ill.) Cohn v. Scott, 342.

8. **DIVORCE—Custody of Children—Discretion.**—In awarding the custody of a child in divorce proceedings a very large discretion must be permitted to the chancellor; but it must be a judicial discretion, and is subject to review on the evidence heard in open court. (Ill.) Cohn v. Scott, 342.

9. **DIVORCE—Custody of Children—Evidence Out of Court.**—On the question of awarding the custody of a child to one of the parents in a divorce proceeding, the interests of the child cannot be bound by an agreement between counsel, that in addition to the evidence taken in open court, the chancellor may make a personal investigation of the character and home surroundings of one of the parties. (Ill.) Cohn v. Scott, 342.

Death of Party After Appeal.

10. **DIVORCE—Appeal After Death of Party Divorced.**—The death of the plaintiff in a divorce suit before writ of review is sued out by the defendant does not destroy the marriage status so that there is no subject matter of which a court of review can assume jurisdiction. (Ill.) Chatterton v. Chatterton, 339.

11. DIVORCE—Death of Party Divorced Prior to Appeal.—If the successful party to a divorce suit dies before appeal, it is not essential to the right to review the decree by writ of error that it appear from the record of the suit that the deceased left property in which the surviving husband or wife will take an interest upon the decree being reversed. (Ill.) *Chatterton v. Chatterton*, 339.

12. DIVORCE—Appeal After Death of Party Divorced—Practice. Upon a writ of error to review a decree of divorce after the death of the successful party, it is proper to file in the appellate court an affidavit showing to whom the property of the deceased will pass under her or his will, and to make such persons defendants in error. (Ill.) *Chatterton v. Chatterton*, 339.

DOWER.

See Husband and Wife, 3-6.

EASEMENTS.

1. LEASE—Easement of Light and Air.—In the lease of a dwelling there is an implied grant of the right to light and air from adjoining land of the lessor, if the situation and habitual use of the tenement are such that the air and light are essential to its enjoyment. (Ga.) *Darnell v. Columbus Showcase Co.*, 206.

2. LEASE—Easement of Light and Air.—If a lessor cannot use his adjoining land in such a manner as to shut out necessary light and air from a dwelling which he has leased, then one to whom he thereafter rents the adjoining land cannot do so. (Ga.) *Darnell v. Columbus Showcase Co.*, 206.

3. LEASE—Damages for Injury to Tenement.—Where one of the tenants of a common landlord piles lumber on his part of the leased premises so as to obstruct the light and air of the other tenant, and so as to cast water into his tenement in order to cause him to abandon the lease, the injured tenant may recover punitive damages in addition to compensatory damages for the depreciated rental value of the tenement. (Ga.) *Darnell v. Columbus Showcase Co.*, 206.

See Deeds, 3.

EJECTMENT.

EJECTMENT.—A Tenant in Common is Entitled to Recover Possession of the Whole Premises against a defendant who is in possession of the land, but has no title thereto other than liens for taxes paid. (Kan.) *Horner v. Ellis*, 446.

ELECTIONS.

In General.

1. ELECTION to Change County Seat—Majority of Voters Voting on the Question is Sufficient.—Under a constitution providing that no courthouse or county seat shall be removed except by a majority vote of the qualified electors of the county voting at an election held for such purpose, it is not necessary that there be a majority of the electors of the county voting in favor of the removal. All that is required is a majority of the persons voting at the election. (Ala.) *Ex parte Owens*, 67.

2. ELECTION—Secrecy is not Essential to a Ballot.—An election by ballot is not necessarily secret. (Ala.) *Ex parte Owens*, 67.

3. ELECTIONS.—A Ballot is a little ball or a printed or written ticket used in voting. (Ala.) *Ex parte Owens*, 67.

4. ELECTION—Secrecy of Ballots—Numbering of Ballots.—A statute providing for the numbering of ballots to correspond with the numbers on the poll lists is not unconstitutional as invading the secrecy of elections under a constitution providing for elections by ballot. (Ala.) *Ex parte Owens*, 67.

5. ELECTIONS—Class Legislation.—A statute taking the city of Memphis out of the operation of the general election statute and placing it in a class by itself, whereby in the use of the elective franchise it is relieved from burdens imposed upon other communities, and its people deprived of safeguards vouchsafed to other communities, is unconstitutional. (Tenn.) *Malone v. Williams*, 1002.

Statute Allowing Recanvass.

6. CONSTITUTIONALITY OF STATUTE Requiring the Recanvassing of Votes.—A statute authorizing a proceeding to recanvass the votes cast at a prior election for the office of mayor of a city or a judicial hearing and determination of the title of the respective candidates at that election contravenes the section of the state constitution declaring that all laws creating, regulating or affecting boards or officers charged with the duty of receiving, recording or counting votes at elections shall secure an equal representation of the two political parties, or of that section providing that trial by jury in all cases in which it has heretofore been used shall remain inviolate forever. (N. Y.) *Matter of Metz v. Maddox*, 909.

7. CONSTITUTIONAL LAW—Power to Create a Tribunal and Authorize the Recounting of Votes.—Where the results of an election have been canvassed and determined under the provisions of law then existing, and a certificate of election given conferring a prima facie title to the office, possession of which has been held thereunder, the legislature has no power to create a new tribunal to authorize it to recanvass the election and award the possession of the office to another claimant should be found entitled thereto. (N. Y.) *Matter of Metz v. Maddox*, 909.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENTIRETIES.

See Husband and Wife, 7, 8.

EQUITY.

1. EQUITY JURISDICTION.—If a court of equity has, by its decree, ordered and directed persons properly within its jurisdiction to do, or refrain from doing, a certain act, it may compel obedience to this decree by appropriate proceedings, and any action taken by reason of such compulsion is valid and effectual wherever it may be assailed. (Neb.) *Fall v. Fall*, 767.

2. BILL IN EQUITY—Combining Legal and Equitable Matters.—A Demurrer to a bill on the ground that it combines matters triable by a court of equity with matters triable at law should specify what is alleged to be triable only at law. (Md.) *Murphy v. Penniman*, 583.

3. PLEADING.—A Cross-bill must be Confined to the subject matter of the original bill, and cannot introduce new and distinct matters not embraced in the original bill. (Ill.) *Patterson v. Northern Trust Co.*, 299.

4. PLEADING.—Matters in Cross-bills must be Germane to the matter involved in the original bill, and the new facts which it is proper for the defendant to introduce thereby are such only as are necessary for the court to have before it in deciding the questions raised in the original bill to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which the complainant rests his right to aid or relief. (Ill.) *Patterson v. Northern Trust Co.*, 299.

5. PLEADING—Cross-bills.—If an original bill is filed by a trustee solely for the purpose of obtaining an instruction of the court as to his power and duty, as trustee, in bidding at a sale that may be made under a decree of foreclosure theretofore entered, a cross-bill filed for the purpose of vacating the decree of foreclosure upon the ground of fraud is not germane to the original bill, and therefore is subject to demurrer. (Ill.) *Patterson v. Northern Trust Co.*, 299.

6. PLEADING—Cross-bills—Want of Equity.—A demurrer to a cross-bill is properly sustained when it shows no equity on its face. (Ill.) *Patterson v. Northern Trust Co.*, 299.

See Wills, 20-26.

ESTATES OF DECEDENTS.

See Executors and Administrators; Wills.

ESTOPPEL.

See Fixtures; Judgments.

EVIDENCE.

1. JUDICIAL NOTICE.—The Prevalence of *Boophilus Bovis*, or Southern Ticks, in the cattle country south of Kansas is a fact of common knowledge, of which the courts take judicial notice. (Kan.) *State v. Asbell*, 345.

2. EVIDENCE of Fact Admitted.—It is not reversible error to permit a witness to testify to a fact admitted or already proven. (Mich.) *Haapa v. Metropolitan Life Ins. Co.*, 627.

3. EVIDENCE Admissible for One Purpose Only is not to be Considered for Another.—Evidence which is purely hearsay and incompetent as to one issue, but admissible as to another, is not to be considered as bearing on the former. (N. Y.) *Stronge v. Knights of Pythias*, 902.

4. PRACTICE—Evidence After Close of Case.—If evidence in a cause is heard at one term of court and the cause is taken under advisement until the next term, it is no abuse of discretion to permit the introduction in evidence at that term of the certified copy of plaintiff's appointment as administrator, especially when this in no way injures the defendant. (Mo.) *Gross v. Watts*, 662.

See Criminal Law.

EXECUTION.

ALL FRAUDULENT JUDICIAL or Execution Sales are void as against any party having a vested interest in the property and

those in collusion with or participating in the fraudulent transaction. (Kan.) McKelvey v. McKelvey, 435.

EXECUTORS AND ADMINISTRATORS.

In General.

1. **ADMINISTRATION—Relief in Equity for Fraud.**—A court of equity has power to set aside the judgment of a court of ordinary granting letters of administration, on the ground that it was procured by a fraudulent representation of jurisdictional facts. (Ga.) Neal v. Boykin, 237.

2. **ADMINISTRATION—Jurisdiction to Grant Letters.**—The existence of a promissory note in one county, when the maker resides in another county, does not confer jurisdiction on the probate court in the former county to grant letters of administration on the estate of the deceased nonresident payee. (Ga.) Neal v. Boykin, 237.

3. **ADMINISTRATION—Jurisdiction to Grant Letters.**—For the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor, and the locality of the debt for this purpose is not affected by a promissory note or bill of exchange having been given for it. (Ga.) Neal v. Boykin, 237.

4. **ADMINISTRATION.—A Temporary Administrator** has no authority to maintain a suit in equity to set aside the appointment of a permanent administrator. The heirs and creditors are the proper parties plaintiff. (Ga.) Neal v. Boykin, 237.

5. **PRACTICE—Appointment of Administrator.**—If the answer is a general denial, it is not necessary for the plaintiff to prove his appointment as administrator. It can only be questioned by a special plea in abatement. (Mo.) Gross v. Watts, 662.

6. **CONSTITUTIONAL LAW, What is not a Denial of the Right to a Hearing.**—The striking out of the pleadings of parties who appear in opposition to an application for the distribution of the estate of a decedent on the ground that it appears by the records of the court that the will of the testator has been admitted to probate, and therefore it is clear that such parties have no interest, is not a denial of the right of such parties to a hearing. (Cal.) Estate of Davis, 105.

Deed or Patent to Executor.

7. **PATENT TO LAND to Executors.**—A patent to land to "J. and N., executors of the estate of S., and to their heirs and assigns forever," conveys title to such executors individually, and not to the estate mentioned, as the words "executors of the estate of S." are merely descriptio personae. (Mich.) Sanborn v. Loud, 614.

8. **PATENT TO LAND to Executors—Extrinsic Evidence.**—If a patent to land is issued to "J. and N., executors of the estate of S.," the court cannot, in an action of ejectment, look outside the instrument to find evidence that it was the intention of the grantees to secure the title for the estate and thereby declare the estate to be in the grantee. (Mich.) Sanborn v. Loud, 614.

9. **CONVEYANCE TO EXECUTORS—Trusts—Parties.**—If land is conveyed to certain parties, "executors of the estate of S.," it cannot be declared to be held by them as trustees of such estate in a suit to which they are not parties. (Mich.) Sanborn v. Loud, 614.

EXEMPTIONS.

EXEMPTIONS—Waiver in Partnership Note.—A waiver of exemption and homestead rights in a note signed by a partner in the firm name is effectual as against his individual property. (Ga.) *Perry v. Britt-Carson Shoe Co.*, 232.

FERRIES.

FERRIES—Power of City to Regulate.—A statute giving the city of Memphis exclusive power to regulate and license ferries within the limits of the city is unconstitutional as a delegation to the city of power which belongs to the county court. (Tenn.) *Malone v. Williams*, 1002.

FIDELITY BOND.

See Insurance, 2.

FIXTURES.

1. **FIXTURES—Buildings.**—A building erected to effectuate the purpose for which land is conveyed, for permanent use, and upon a substantial rock foundation, becomes a fixture and part of the realty. (Colo.) *Mosca Town Co. v. Wellington*, 175.

2. **FIXTURES—Right to Remove.**—If land is conveyed to be used for a specified purpose, with reversion upon the grantee ceasing to use it for that purpose, and a building is erected thereon for permanent use to effectuate such purpose, such building becomes a fixture, and cannot be removed by an assignee of such grantee after the property has ceased to be used for the intended purpose. (Colo.) *Mosca Town Co. v. Wellington*, 175.

3. **ESTOPPEL—Judgment—Inconsistent Position.**—If land is conveyed with reversion upon the grantee ceasing to operate a tannery thereon, and a third person sells him lumber on credit which is used in a tannery building erected on the land, and afterward obtains a judgment against him for the price of the lumber, such third person cannot, upon the tannery ceasing to operate, claim a right to the building or to the material used therein, under an agreement with such grantee before the judgment that he should have the building in settlement of his claim. (Colo.) *Mosca Town Co. v. Wellington*, 175.

4. **FIXTURES—Buildings—Right to Remove.**—If land is conveyed to be used for a specified purpose with reversion upon the grantee ceasing to use it for that purpose, and a building is erected thereon by the grantee for permanent use to effectuate such purpose, such building becomes a fixture, and the grantor has a right, after the property has ceased to be used for the purpose specified, to take possession, tear down the building, and remove the material, as against any claim therefor by an assignee of the grantee. (Colo.) *Mosca Town Co. v. Wellington*, 175.

FLAG.

See Constitutional Law, 28-31.

FORCIBLE ENTRY AND DETAINER.

1. **PLEADING, Amendment of in Cases of Unlawful or Forcible Entry and Detainer.**—A complaint alleging an unlawful entry and forcible detainer of premises may be amended so as to charge an unlawful and forcible entry. (Kan.) *Wilson v. Campbell*, 366.

2. FORCIBLE ENTRY not Justified by Ownership and Right of Possession.—If an owner entitled to the possession can lawfully obtain it, he may enter and hold it, but he has not the right to resort to unlawful and forcible means to gain possession. (Kan.) *Wilson v. Campbell*, 366.

3. FORCIBLE ENTRY, Force Sufficient to Sustain Proceeding for. If an occupant of property leaves it with the building located thereon, and in his absence a party of men acting for another invade the premises, detach and carry away the furniture and fixtures, load them on a car, and carry them away and place them in a warehouse, this is sufficient evidence of a forcible entry. (Kan.) *Wilson v. Campbell*, 366.

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 See Forcible Detainer.

Foreign Bills of Exchange. See Bills of Exchange, Foreign.

FORFEITURE.

FORFEITURE—Laches—Estoppel.—One who signs an agreement waiving a forfeiture of a leasehold interest in property and authorizes the institution of a suit to foreclose the landlord's lien

which terminates in a decree of foreclosure, cannot, after the lapse of many years, by cross-bill raise the question that the trustee of the estate should have insisted upon a strict foreclosure of the lease. (Ill.) *Patterson v. Northern Trust Co.*, 299.

FORGERY.

See Deeds, 7.

FRAUD.

FRAUD.—Jurisdiction of a court of equity to set aside a decree in foreclosure upon the ground of fraud and collusion can only be invoked when it is made to appear that the complainant has been injured thereby. (Ill.) *Patterson v. Northern Trust Co.*, 299.

FRAUDS, STATUTE OF.

Partnership in Land.

1. **STATUTE OF FRAUDS—Partnership in Lands.**—A parol agreement by the buyer of lands to admit another into partnership with him is void as within the statute of frauds. (Neb.) *Norton v. Brink*, 822.

2. **STATUTE OF FRAUDS—Partnership in Lands.**—A parol agreement between two persons to purchase land "in partnership," the purchase being made by one of them, who pays the whole purchase price, and takes the title in himself, is void as within the statute of frauds. (Neb.) *Norton v. Brink*, 822.

Memorandum in Writing.

3. **STATUTE OF FRAUDS.**—The Memorandum Required to Satisfy the Statute of Frauds must give the name of the contracting parties of some description by which they can be identified. (Kan.) *Mertz v. Hubbard*, 352.

4. **STATUTE OF FRAUDS—Necessity of Showing for Whom an Agent Acted in Making a Contract Relating to Real Property.**—If a contract for the sale of real property shows that one of the parties subscribing it acted as agent for some undisclosed principal, it cannot be enforced against the latter where his relation to it must be established, if at all, by parol evidence. (Kan.) *Mertz v. Hubbard*, 352.

5. **STATUTE OF FRAUDS—Memorandum may be Several Instruments.**—The statute of frauds does not require that the contract shall consist of a single instrument. Several distinct and separate writings may be considered together as containing all the terms of a contract, though one only of them is signed by the party to be charged. (Kan.) *Schneider v. Anderson*, 356.

6. **STATUTE OF FRAUDS—Helping Out Memorandum by an Undelivered Conveyance.**—If a contract for the sale and purchase of real property is not of itself sufficient, but at the time it was executed the vendor also executed a conveyance of the property pursuant to the sale, to be delivered to the grantee on his compliance with the conditions of the sale, such memorandum and conveyance may be considered and construed together, and if from both the contract sufficiently appears, specific performance thereof will be decreed. (Kan.) *Schneider v. Anderson*, 356.

7. **STATUTE OF FRAUDS—Failure of One of the Parties to Sign Memorandum.**—The failure of one of the parties to sign the contract or memorandum cannot be pleaded as a defense by the other who did

sign it. The filing of the bill for specific performance constitutes an acceptance by the complainant. (Kan.) *Schneider v. Anderson*, 356.

FRAUDULENT CONVEYANCE.

FRAUDULENT TRANSFER—Rejection of Evidence Showing that Conveyance was Made without Consideration.—In an action by a wife to recover her interest in lands which she claims were subjected to a fraudulent execution sale for the purpose of divesting her interest, it is reversible error to sustain an objection to a question to the purchaser at the sale asking him whether he paid the consideration named in the deed. (Kan.) *McKelvey v. McKelvey*, 435.

See Husband and Wife, 3-6.

GAME LAWS.

1. INTERSTATE COMMERCE—Police Power—Preservation of Nongame Birds.—In the exercise of its police power the state may make it an offense to have nongame birds in possession for transportation beyond the state, and a statute creating this as an offense does not violate the interstate law relating to commerce. (La.) *In re Schwartz*, 516.

2. CONSTITUTIONAL LAW—Protection of Nongame Birds.—A statute which prevents the useless destruction of nongame birds and prohibits their sale under a penalty is not unconstitutional either as a restraint of liberty of trade, or as authorizing seizures without due process of law. (La.) *In re Schwartz*, 516.

GAMING.

1. GAMING—Keeping Poker-table.—Under a statute prohibiting the setting up or keeping "any kind of gambling table or gambling device, adapted, devised, and designed for the purpose of playing any game of chance for money or property," and the inducing, enticing or permitting "any person to bet or play at or upon any such gaming-table or gambling device," it makes no difference whether the table on which the game of poker is played is a gambling device or not; and if it is a table adapted, devised, or designed for the purpose of playing any game of chance for money or property, and the defendant permitted any person to bet upon and play poker upon such table, he is guilty of a violation of the statute. (Mo.) *State v. Mathis*, 687.

2. GAMING—Keeping Poker-table—Evidence.—That a poker-table, so called, is adapted and designed for the purpose of playing games of chance is clearly shown by the fact that games of poker are played thereon. (Mo.) *State v. Mathis*, 687.

3. GAMING—Keeping Poker-table.—Although Cards may be Necessary to be used in conjunction with a table or other device, to play the game of poker, it is none the less a gambling-table or device when used in conjunction with cards for the purpose of playing poker for money or property. (Mo.) *State v. Mathis*, 687.

4. GAMING—Keeping Gambling Table—Craps.—Whether a table used is specially adapted, devised and designed for the purpose of playing the game called craps, for money or property, is immaterial, so long as it is used for such purpose and persons are permitted to bet at or play upon such table. It then becomes a gambling table within the meaning of the statute. (Mo.) *State v. Mathis*, 687.

5. GAMING—Recovery of Gambling Devices.—An action in replevin or claim and delivery cannot be maintained for the recovery of articles admitted to be devised and constructed solely and exclusively for gambling purposes, and only capable of use in violating the laws of the state. (Idaho) *Mullen & Co. v. Moseley*, 277.

6. GAMING—Recovery of Gambling Devices.—No one can maintain an action for injury to, or for the recovery of, an article, used solely for gambling in violation of the penal laws of the state. (Idaho) *Mullen & Co. v. Moseley*, 277.

7. GAMING—Seizure and Destruction of Gambling Devices.—A statute which authorizes the summary seizure and destruction of gambling devices is a legitimate and valid exercise of the police power of the state for the protection of the morals, peace, safety and prosperity of the community. (Idaho) *Mullen & Co. v. Moseley*, 277.

8. CONSTITUTIONAL LAW—Summary Seizure of Gambling Devices.—A statute authorizing a summary seizure and destruction of gambling instrumentalities and devices is valid, and not unconstitutional as depriving the citizen of his property without due process of law. (Idaho) *Mullen & Co. v. Moseley*, 277.

9. GAMING—Gambling Devices—Nuisances.—Instruments and devices by and with which gambling is carried on are nuisances without any express declaration to that effect in a statute prohibiting their use and authorizing their summary seizure and destruction. (Idaho) *Mullen & Co. v. Moseley*, 277.

10. GAMING—Summary Seizure of Gambling Devices.—Gambling implements which are designed to be used in violation of the criminal law may be summarily seized by the police authorities under a statutory power of general police regulation and to prevent crime. (Idaho) *Mullen & Co. v. Moseley*, 277.

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GARNISHMENT.

GARNISHMENT.—The Compensation Due an Administrator may be reached by garnishment for his individual debt, but service of the attachment upon the clerk, as permitted in attaching a fund in court, does not create any lien on funds of the estate in the hands of the administrator. (Ky.) *Sanders v. Herndon*, 493.

GRAZING.

See Animals, 7-11.

GUARDIAN AD LITEM.

See Infants, 1.

HIGHWAYS.

See Negligence.

HOMESTEADS.

HOMESTEADS—Liens.—If a mortgage lien existing on a homestead is extinguished by the proceeds of a loan secured by a new mortgage on the same land, and the interest of the homestead claimant at no time exceeds the statutory amount in value, and the land while thus mortgaged is sold to a third person, who occupies it as a homestead, a judgment filed while the first mortgage was in force does not become a lien upon the land superior to the new mortgage. (Neb.) *Goble v. Brenneman*, 813.

HOMICIDE.

1. **HOMICIDE—Manslaughter—Neglect of Duty.**—Under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter, but the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death. (Mich.) *People v. Beardsley*, 617.

2. **HOMICIDE—Manslaughter—Neglect of Duty.**—If a woman with ample experience in such affairs goes on a drunken debauch with a man not her husband, and during such debauch attempts to commit, and succeeds in committing, suicide, the doctrine of legal duty cannot be invoked to hold the man criminally liable for omitting to make an effort to save her life. (Mich.) *People v. Beardsley*, 617.

HUSBAND AND WIFE.*Liability for Necessaries.*

1. **HUSBAND AND WIFE—Liability of Husband for Necessaries Furnished Wife on Her Credit.**—Primarily the husband is liable for the necessaries of life of his wife, including board and lodging, and the fact that the debt was contracted by her and the credit was extended to her alone does not relieve him of the liability cast upon him by operation of law and independent of the contract of his wife, and any personal liability she may have incurred in order to secure the credit. (Idaho) *Edminston v. Smith*, 294.

2. **HUSBAND AND WIFE—Special Promise of Wife to Pay for Necessaries.**—If necessaries are furnished to a wife for her use and benefit, and upon credit extended on the faith of her special promise to pay therefor, and upon her personal responsibility, she is liable for the debt and may be sued as a feme sole. (Idaho) *Edminston v. Smith*, 294.

Interest of Wife in Husband's Lands—Fraudulent Conveyance.

3. **HUSBAND AND WIFE—Interest of Nonresident Wife in Husband's Land.**—As to lands of a married man, his wife, whether resident or nonresident, has a present interest, under a statute declaring that, on the death of a husband, one-half of any lands in which he has an interest shall, under the direction of the probate court, be set aside by the executor as her property in fee simple, provided that she shall not be entitled to any interest in any land which he has conveyed, when she was not, and never has been, a resident of the state, and the wife may protect such interest by appropriate action during the life of the husband as against his wrongful acts. (Kan.) *McKelvey v. McKelvey*, 435.

4. **HUSBAND AND WIFE, Recovery by Her of Lands Which He Fraudulently Disposed of.**—As the interest of a wife in her husband's lands does not come to her by inheritance, it is not a bar to her recovery that he parted with his title in such a fraudulent manner that neither he nor his heirs can recover it. (Kan.) *McKelvey v. McKelvey*, 435.

5. **HUSBAND AND WIFE—Fraudulent Execution Sales, Effect of upon Her Interest.**—Though the statute provides that the wife has no interest in lands of her husband which had been sold at execution or judicial sale, it contemplates such execution or judicial sales as become necessary to pay his debts, and not fraudulent or collusive

sales having no other object than to fraudulently defeat her title. (Kan.) McKelvey v. McKelvey, 435.

6. **HUSBAND AND WIFE, Her Right to Maintain an Action for Her Interest in His Lands.**—Notwithstanding the interest which the wife has in the lands of her husband, she cannot, in his lifetime, maintain ejectment or partition for such interest. (Kan.) McKelvey v. McKelvey, 435.

Estate by Entireties.

7. **ESTATE BY ENTIRETIES.**—A Judgment Against a Husband is not a lien on land held by him and his wife as tenants by the entireties. (Md.) Jordan v. Reynolds, 578.

8. **ESTATE BY ENTIRETIES.**—A Husband and Wife can Convey, clear from a judgment outstanding against him, land held by them as tenants by entireties. (Md.) Jordan v. Reynolds, 578.

Actions by and Against Married Women.

9. **MARRIED WOMAN, Action, When Proper in the Name of.**—If, through the wrongful act of the defendant, a wife is thrown into a state of excitement, bringing on labor pains and resulting in miscarriage, an action is properly brought in her name. (Ala.) Engle v. Simmons, 59.

10. **MARRIED WOMAN, Trespass Committed at Residence of, Leading to Injury to.**—If a trespass is committed at the residence of a married woman and her husband, on account of which she suffers personal injury, it is not material whether the title to the property where she was residing was in her or in him. Whether it was in him or her, she may maintain an action for the injuries suffered by her. (Ala.) Engle v. Simmons, 59.

11. **MARRIED WOMEN—Right to Contract, Sue and be Sued as Feme Sole—Conflict of Laws.**—A married woman having the right under the law of her domicile to enter into a contract as a feme sole and to sue and be sued without her husband being joined as a party, her status, as to contracting and suing and being sued, accompanies her to another state, especially when no community rights or obligations are involved. (La.) Freret v. Taylor, 522.

12. **MARRIED WOMEN, Actions Against—Joinder of Husband—Conflict of Laws.**—Laws enacted by certain states for the protection of married women by requiring the authorization of their husbands to their contracts and to be joined with them in suits thereon are personal statutes, and if in the state where the parties have their domicile such protective laws are not deemed necessary, it is not the duty of other states in which such parties may chance to temporarily sojourn to safeguard their rights or restrict their actions in a manner or to an extent other and different from what is provided in the state of their domicile. (La.) Freret v. Taylor, 522.

13. **MARRIED WOMEN—Suits Against—Joinder of Husband—Conflict of Laws.**—If a married woman having the right under the law of her domicile to contract, sue and be sued as a feme sole is sued upon a contract made by her personally and alone in another state, and she applies for and obtains authority to file an answer in such suit, she thereby joins issue with the plaintiff on his demand upon filing her answer, and has full power to present all her defenses. The authority to file such answer carries with it, as a legal consequence, the right to make good, if she can, independently of her husband, all the allegations of such answer. (La.) Freret v. Taylor, 522.

See Adverse Possession; Witness, 1.

INDICTMENT.

INDICTMENT—Omission of a Syllable.—An information charging the bringing of cattle into the state without an inspection by the livestock sanitary "commission," when the word "commissioner" should have been used, is not fatally defective when it also charges the want of any inspection whatever. (Kan.) *State v. Asbell*, 345.

INFANTS.

1. **INFANTS.**—**The Next Friend of an Infant has No Authority to receive payment or to enter satisfaction of a judgment in favor of an infant.** (Ala.) *Collins v. Gillespy*, 81.

2. **INFANTS—Repudiation of Contract to Convey.**—Where an infant makes an executory contract to convey land, and expends the money in obtaining a professional education, he is not required to make any tender as a condition to repudiating the contract on his arrival at majority. (Ga.) *White v. Sikes*, 228.

3. **INFANCY—Capacity to Commit Negligence.**—A child about eight years old is prima facie presumed to be incapable of committing contributory negligence. (S. C.) *Tucker v. Buffalo Cotton Mills*, 957.

4. **INFANCY—Capacity to Commit Trespass.**—A child about eight years old is prima facie presumed to be incapable of committing trespass. (S. C.) *Tucker v. Buffalo Cotton Mills*, 957.

See Master and Servant, 8-11; Parent and Child.

INNKEEPERS.

1. **AN INNKEEPER has a Lien on Personal Property in the Possession of a Guest, and held by him under a contract for the conditional sale and purchase thereof, reserving title in the vendor until payment of the purchase price, if the innkeeper, when such property came into his possession, did not know that the guest was not the complete owner thereof.** (N. Y.) *Waters & Co. v. Gerard*, 886.

2. **AN INNKEEPER has, by the Common Law, a Lien on the Goods of His Guest, although they are the property of a third person.** (N. Y.) *Waters & Co. v. Gerard*, 886.

3. **INNKEEPER'S LIEN, When not Extended by Statute.**—A statute of New York giving a lien to an innkeeper on the goods of his guest, brought to the inn, whether they belong to him or not, is but a declaration of the common law, and therefore does not extend the innkeeper's lien. (N. Y.) *Waters & Co. v. Gerard*, 886.

4. **INNKEEPERS, Constitutionality of Statute Purporting to Give Lien to.**—A statute purporting to give innkeepers a lien on the goods of their guest cannot be held unconstitutional when such statute does not extend beyond the rule established by the common law, nor beyond the requirements of public policy. (N. Y.) *Waters & Co. v. Gerard*, 886.

INSANE DELUSIONS.

See Wills, 11-14.

INSTRUCTIONS.

See Trial.

INSURANCE.

Fire Insurance.

1. **INSURANCE.—Temporary Increase in Risk** forbidden by a policy of fire insurance does not avoid it when the increase of hazard has come to an end without loss, and the loss occurs from another cause. (S. C.) *Sumter Tobacco etc. Co. v. Phoenix Assur. Co.*, 941.

Fidelity Insurance.

2. **FIDELITY BOND—Failure to Disclose Defaults.**—Where a general agent of an insurance company requires of a subagent a bond for the prompt accounting of moneys collected by him, but fails to disclose to the sureties, they making no inquiries, that the subagent is already indebted to him on account of known embezzlement, the sureties are relieved from liability, although the bond obligates them for prior as well as existing debts. The rule is otherwise, however, if the acts of the subagent do not involve moral turpitude, but are such as are consistent with honesty, and tend only to show him negligent, dilatory, or unskillful. In such case the law does not impose the duty on the obligee, unasked, to give the sureties information of such facts. (Tenn.) *Hebert v. Lee*, 989.

Accident Insurance.

3. **INSURANCE, ACCIDENT—Loss of Hand—What is.**—It is a proper question for the jury to determine whether a total loss of three fingers with injury to the remaining finger and thumb, and the removal of nearly half of the palm of the hand, constitute a total loss of the hand within the meaning of a by-law of a mutual benefit society providing insurance for "any member in good standing suffering, by means of physical separation, the loss of a hand at or above the wrist joint." (Neb.) *Beber v. Brotherhood of R. R. Trainmen*, 782.

Life Insurance.

4. **LIFE INSURANCE—Lack of Insurable Interest.**—Where, in accordance with a previous arrangement between the parties, one takes out a policy of insurance on his life payable to his estate, and assigns it to the other, who has no insurable interest, but who pays the insured a consideration therefor and also pays all premiums, the policy is unenforceable as a wagering contract. (Ky.) *Bromley v. Washington Life Ins. Co.*, 467.

5. **LIFE INSURANCE—Incontestable Clause.**—A policy of life insurance which is opposed to public policy is not rendered enforceable by an incontestable clause. (Ky.) *Bromley v. Washington Life Ins. Co.*, 467.

6. **INSURANCE, LIFE—Forfeiture, Construction of Clauses for.**—A by-law adopted after the issuing of a certificate of insurance providing for a forfeiture will be strictly construed most strongly against the association, and if passed in contravention of the provisions either of the articles of association, the constitution and by-laws of the society, or the statute governing it, is void. (Neb.) *Lange v. Royal Highlanders*, 786.

7. **INSURANCE, LIFE—Warranty as to Health—Knowledge of Agent.**—The knowledge of a soliciting insurance agent, who is under no duty to discover the facts, and whose authority does not extend to receiving applications for life insurance or to receiving any communications upon the subject, that an application for insurance contains a false statement as to the condition of the applicant's health,

cannot be imputed to the insurer, nor is he bound thereby. (Mich.) *Haapa v. Metropolitan Life Ins. Co.*, 627.

8. INSURANCE LIFE—Warranty as to Health—Knowledge of Agent—Estoppel.—If a soliciting insurance agent who is under no obligation to discover the facts, and who has no authority to receive applications for insurance, has knowledge of a false statement in an application for life insurance as to the state of the applicant's health, his mere silence in regard thereto does not estop the insurer from taking advantage of such false statement, afterward made by the insured to another agent of the insurer charged with the duty of receiving the application upon which the insurer acted in issuing the policy. (Mich.) *Haapa v. Metropolitan Life Ins. Co.*, 627.

9. INSURANCE, LIFE—Breach of Warranty.—If life insurance is procured through a false statement in the application as to the state of the health of the applicant, the insurer, who was ignorant of the real facts at the time of issuing the policy, is not estopped to assert a breach of warranty in the application, by reason of communications as to the state of health of the applicant made by the insured to the insurer's agent, who had no duty resting upon him to discover the facts, and whose authority did not extend to receiving applications, or communications upon the subject. (Mich.) *Haapa v. Metropolitan Life Ins. Co.*, 627.

10. INSURANCE, LIFE—Breach of Warranty—Direction of Verdict.—If the insured, while being examined for life insurance and knowing that she had heart disease, falsely stated that she was in good health, and though she could not read the application it was explained to her and the questions asked through an interpreter, and the application like the policy contained a provision that no liability should be incurred unless the policy was delivered while the insured was in good health, the court properly directed a verdict for the insurer, though a witness who was present at the examination testified that the insured was not asked whether she had heart disease. (Mich.) *Haapa v. Metropolitan Life Ins. Co.*, 627.

11. INSURANCE—LIFE.—Proofs of Death being in the nature of admissions, are competent evidence in an action on a life insurance policy. (Mich.) *Haapa v. Metropolitan Life Ins. Co.*, 627.

12. LIFE INSURANCE.—The Killing by a Husband of His Wife's Paramour, although under such circumstances that the law pronounces it justifiable homicide, is not at the "hands of justice, either punitive or preventive," within the meaning of a statute which declares that death "by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract." (Ga.) *Supreme Lodge K. of P. v. Crenshaw*, 216.

13. LIFE INSURANCE.—The Death of an Adulterer, at the hands of the husband, either while attempting intercourse with the wife or immediately after the completion of intercourse, is not within the condition of a policy of life insurance that "if death is caused or superinduced at the hands of justice, or in violation of or attempt to violate any criminal law," the insurer shall not be liable for the full amount of the policy. (Ga.) *Supreme Lodge K. of P. v. Crenshaw*, 216.

14. LIFE INSURANCE—Good Standing of Assured—Pleading.—If the plaintiff in an action on a life insurance policy makes a general allegation that the insured was a member of the defendant order in good standing at the time of his death, but does not allege the facts constituting good standing, the defendant has a right to interpose a denial to the allegation as made, and impose upon the

plaintiff the burden to sustain the allegation by proof. (Ga.) Supreme Lodge K. of P. v. Crenshaw, 216.

15. **INSURANCE, LIFE.**—Suicide will not Defeat Recovery upon a contract of life insurance made by a member with a beneficial association, and not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms. (Neb.) Lange v. Royal Highlanders, 786.

Pledge of Policy.

16. **LIFE INSURANCE**—Pledge or Assignment of Policy.—A statute providing that where the beneficiaries in a policy of life insurance are the wife and children of the insured, the insurance shall be paid to them free from his debts, does not prevent him from assigning the policy, or pledging it with the company as security for a loan, without their consent. (Ky.) Mutual Life Ins. Co. v. Twyman, 471.

17. **LIFE INSURANCE**—Assignment as Collateral—Enforcement of Pledge.—Where an insured assigns his paid-up policy to the company as security for a loan, it cannot, on his default in paying the debt, forfeit, cancel or sell the policy, but it must resort to equity to enforce its rights, basing them on the surrender value of the policy. If the court finds that the surrender value exceeds the debt, the insured is entitled to receive such excess in money, or in paid-up insurance, as he elects. (Ky.) Mutual Life Ins. Co. v. Twyman, 471.

18. **LIFE INSURANCE**—Right to Pledge Policy.—One who takes out a policy of insurance on his life in which his wife is named as beneficiary, and which provides for an assignment or change of beneficiaries with the consent of the company, may, without her consent, assign it to the company as collateral security for a loan, and, when the debt is due, surrender the policy at its cash value to the company in payment. (Ky.) Crice v. Illinois Life Ins. Co., 489.

See Beneficial Associations.

INTEREST.

See Usury.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

License and Screens.

1. **INTOXICATING LIQUORS**—License—Evidence.—If an applicant for a liquor license shows prima facie that the signers of his petition possess the necessary statutory qualifications, a finding in his favor will not be disturbed on appeal. (Neb.) In re MacRae, 829.

2. **INTOXICATING LIQUORS**—Application for License—Sale on Sunday.—If an applicant for a liquor license is charged before the licensing board with having sold liquor on Sunday, and the evidence is conflicting, a finding in his favor on that question will not be reversed on appeal. (Neb.) In re MacRae, 829.

3. **INTOXICATING LIQUORS**—Screens—License.—If the apparent purpose of a statute is to secure to the proper authorities at all times an unobstructed view of the manner in which intoxicating liquor is being sold, and the evidence shows that an applicant for a liquor license so screened the windows and doors of his place of busi-

ness as to obstruct the view, a licensing board must refuse to issue him a license. (Neb.) *In re MacRae*, 829.

Regulation of Sales—Sunday Laws.

4. **CONSTITUTIONAL LAW—The Police Power.**—Statutes undertaking to limit the sale of liquors on Sunday must be referred to the police power, and, if sustainable, must be sustained as an exercise of that power. (Ala.) *Beauvoir Club v. State*, 82.

5. **CONSTITUTIONAL LAW—Regulation or Prohibition of the Sale of Intoxicating Liquors.**—The traffic in intoxicating liquors is a proper subject of police regulation, and may be controlled, restricted or even prohibited, without violating any constitutional right; and this rule applies to social clubs. (Ala.) *Beauvoir Club v. State*, 82.

6. **INTOXICATING LIQUORS—Social Clubs.**—A transaction whereby an incorporated social club sells intoxicating liquors to one of its members is within the meaning of the statute prohibiting the sale of intoxicating liquors without a license or prohibiting the sale of intoxicating liquor on Sunday. (Ala.) *Beauvoir Club v. State*, 82.

7. **CONSTITUTIONAL LAW—Sunday Laws.**—It is within the exercise of the police power for the legislature to enact laws against keeping open on Sunday places for the sale of intoxicating liquors, whether such sales are for profit or not. Nor is it material whether the sales are public or private, provided the places are kept open therefor. (Ala.) *Beauvoir Club v. State*, 82.

8. **CONSTITUTIONAL LAW—Special Legislation—Statutes Undertaking to Make Sales of Intoxicating Liquors by One Club Lawful.** A statute undertaking to make lawful the sales of intoxicating liquors by a social club under circumstances where like sales by other social clubs are unlawful, is unavailing as against a constitution providing that the operation of no general law shall be suspended by the general assembly for the benefit of any individual, corporation or association. (Ala.) *Beauvoir Club v. State*, 82.

Unlawful Sales.

9. **LIQUORS.**—Ignorance that Liquors are Intoxicating constitutes no defense or excuse for their unlawful sale. The seller must know at his peril whether or not they are intoxicating, and his belief that they are not, however honest, and resulting from a guaranty under which he bought them, is no excuse. (Tenn.) *Haynes v. State*, 1055.

10. **INTOXICATING LIQUORS—Sale to Minor.**—If a minor purchases liquor for another who sends him to buy it, and whose money pays for it, and the dealer knows that the real purchaser is an adult and that the minor is only his messenger, the dealer cannot be convicted of selling liquor to a minor. (Neb.) *In re MacRae*, 829.

11. **INTOXICATING LIQUORS—Sale to Minor.**—Merely to deliver liquor to a minor, with notice that it is to be carried to an adult is not a sale within the meaning of the statute. (Neb.) *In re MacRae*, 829.

IRRIGATION.

See. Waters and Watercourses, 1, 2.

JOINT TORT-FEASORS.

See Torta.

JUDICIAL NOTICE.

See Evidence, 1.

JUDGMENTS.*Of Other States.*

1. **JUDGMENTS of Other States—Effect on Title to Realty.**—A decree of chancery, with respect to realty beyond its jurisdiction, can have no direct operation upon the property, and per se can in no way affect the legal or equitable title thereto. (Neb.) Fall v. Fall, 767.

2. **JUDGMENTS of Other States—Effect on Title to Realty.**—A decree of a court of chancery in another state acting upon a person within its jurisdiction and directing him to make a conveyance of lands in nowise affects the title to the land. The decree and order act only upon the person, and, if obedience to its mandate is refused, it can only be enforced by the usual weapons of a court of chancery. (Neb.) Fall v. Fall, 767.

3. **JUDGMENTS of Other States—Faith and Credit.**—The clause of the national constitution providing that the courts of one state shall give full faith and credit to the judgments and decrees of the courts of a sister state does not require the courts of one state to give such judgments more force or greater effect than they would have had if rendered by the courts of that state, upon the same cause of action. (Neb.) Fall v. Fall, 767.

Affecting Streets.

4. **JUDGMENTS Affecting Streets—Res Judicata.**—A judgment by a court having jurisdiction that plaintiffs are the owners in fee of land claimed by a defendant city as a street, and enjoining it from interfering with the plaintiff's possession and use of such land, is binding as res judicata upon the public in the absence of fraud. (Ill.) Healy v. Deering, 331.

5. **JUDGMENTS Affecting Streets—Parties.**—In a suit instituted by an individual to establish his title to, and recover the possession of land claimed by a city as a public street, it is not necessary that both the city and the people of the state should be made parties to the suit to make the judgment binding upon the public. If the city is a party, the public is bound by the judgment. (Ill.) Healy v. Deering, 331.

6. **JUDGMENTS Affecting Streets—Parties—City as Representative of People.**—In an action involving the existence of a street, a city, as a party to the suit, is the representative of the public, who are privies, and a judgment therein, not the result of fraud nor collusion, is binding upon the people. (Ill.) Healy v. Deering, 331.

Estoppel and Res Judicata.

7. **JUDGMENTS—Consent Degree, Who Bound by.**—A judgment by consent of the parties is binding upon them and upon their privies, and cannot be reversed, impeached, or set aside by a bill of review, or bill in the nature of a bill of review, except for fraud. (Ill.) Healy v. Deering, 331.

8. **RES JUDICATA—Estoppel by Verdict.**—The rule that a verdict not followed by judgment is not an estoppel does not apply where the parties agree or acquiesce in a verdict without the entry of a judgment. (Ga.) Crosby v. Pittman, 234.

9. **JUDGMENT, Admissibility of as a Muniment of Title.**—A judgment is admissible against one not a party thereto as a muniment of title. (Cal.) *Chapman v. Moore*, 130.

10. **JUDGMENT Quieting Title, Admissibility and Effect of as Against Third Persons.**—If it is admitted at the trial that the legal title to property at a date specified was in A, a judgment against him at a subsequent date in favor of B vesting title in him to the same property is admissible in a subsequent action against C for the purpose of proving that A's title had at and before the entry of such judgment passed to B. (Cal.) *Chapman v. Moore*, 130.

11. **JUDGMENTS—Res Judicata.**—An action cannot be maintained to set aside or vacate a decree of foreclosure based on a prayer for relief at the trial which resulted in such decree. (Neb.) *City of Lincoln v. Lincoln St. Ry. Co.*, 816.

Collateral Attack.

12. **JUDGMENTS, Collateral Attack upon.**—In a collateral attack upon a judgment of a court of general jurisdiction, it can be impeached only for want of jurisdiction appearing on the face of the judgment-roll. (Cal.) *Estate of Davis*, 105.

See Process.

JURISDICTION.

See Courts; Process.

JURY.

1. **JUROES—Qualifications—Residence.**—Mere temporary absence of a person from the parish of his residence, without intention of changing citizenship or abandoning his residence, will not destroy his qualifications to serve as a juror in such parish. (La.) *State v. Wimby*, 507.

2. **JUROES—Disqualification—Discretion of Court.**—The trial court has a very large discretion to excuse a juror on the ground of legal disqualification, if the circumstances are such as, in his judgment, afford any reasonable ground for apprehension of unfairness, and his ruling in this regard will not be reversed except for an abuse of discretion. (S. C.) *Tucker v. Buffalo Cotton Mills*, 957.

3. **JUROES—Qualifications.**—The trial court need not examine the jurors on their voir dire when no motion is made therefor, and the objection raised rests on admitted facts. (S. C.) *Tucker v. Buffalo Cotton Mills*, 957.

LANDLORD AND TENANT.

See Easements; Railroads, 3.

LICENSE.

LICENSES, Two or More on the Business of the Same Person.—A charter provision that no more than one license shall be assessed or collected from persons doing business under a firm name does not prohibit the exaction from an individual or firm of a license for carrying on the business of a retail dealer in beer and another license for carrying on business as a wholesale dealer in the same article. (Ala.) *City of Mobile v. Phillips*, 17.

LIEN.

See Animals, 2, 3; Innkeepers.

LIMITATION OF ACTIONS.

1. LIMITATION OF ACTIONS—Conflict of Laws.—If the law of one state provides that a civil action upon any agreement, contract or provision in writing must be brought within five years, it only bars the remedy, and does not go further and extinguish the cause of action. Hence a suit to foreclose a mortgage on lands in another state brought in that state, where the period of the statute of limitations is longer, the mortgage being given to secure the payment of a note executed and made payable in the former state, is not barred by its statute of limitations. (Mo.) *Gross v. Watts*, 662.

2. LIMITATION OF ACTIONS—Conflict of Laws.—Except in those cases where the cause of action is extinguished by the statute of limitations, the law of the forum governs. (Mo.) *Gross v. Watts*, 662.

3. LIMITATION OF ACTIONS—Death of Debtor—Extension of Time.—A statute providing that if any person entitled to bring any of the actions before mentioned therein, or liable to any such action, shall die before the expiration of the time limited therein or within thirty days after the expiration of such time, and the action survives, it may be commenced by or against the executor or administrator of the deceased, or the claim may be proved as a debt against the estate of the deceased, at any time within two years after granting letters testamentary or of administration, and not afterward, if barred by the provisions of the statute, does not apply to causes of action barred more than thirty days before death, nor to causes of action not barred until more than two years after the granting of letters testamentary or of administration. (Mich.) *Morse v. Hayes*, 643.

4. LIMITATIONS—Action of Widow to Recover Her Interest in Her Husband's Lands.—If a husband and others institute a proceeding to divest the interest of his wife by a fraudulent execution or judicial sale, and his lands are sold and conveyed pursuant to such sale, her right to maintain ejectment for her interest does not accrue until his death, and hence possession held adversely to her under such sale during his lifetime is not to be considered. (Kan.) *McKelvey v. McKelvey*, 436.

See Adverse Possession; Mortgages, 2.

Note.

Lobbying, contingent compensation, whether affects validity of contracts for, 729, 734, 739.

contracts for based upon agreements for contingent compensation, 729, 734, 739.

contracts for may include the doing of all acts lawful for the employer to do, 735.

contracts for, presumptions in favor of, 733.

contracts for public service in are valid, 736.

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contracts for, when against public policy and void, 726.

contracts for, when valid, 727.

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contracts for, which are not valid, illustrations of, 733-740.

Lobbying, contracts for which may involve improper acts, 735.
 money, use of to influence legislation, whether ever proper, 729.
 persons engaged in must disclose the capacity in which they act,
 728.

MANDAMUS.

Trying Title to Office.

1. **MANDAMUS, Title to Office, When may be Tried upon.**—The title to an office may be drawn in question and incidentally determined on an application for a writ of mandate, though such determination may not be conclusive as an adjudication or estoppel between the parties claiming the office. (Cal.) *McKannay v. Horton*, 146.

2. **MANDAMUS, Trial of Title on Application for.**—Where an application for mandamus is made to compel the issuing of a warrant to pay the salary of an officer, and two persons claim to be entitled to such salary and to be incumbents of the office, and their respective title and rights depend on who is the de facto mayor of a city, and the government of the city must come to a standstill if claims of public creditors cannot be paid, and many matters essential to the public welfare must be left uncared for unless some person is recognized as properly entitled to exercise the functions of mayor, the court is justified in proceeding with the hearing, though in so doing it must determine who is the de facto mayor. (Cal.) *McKannay v. Horton*, 146.

Controlling Medical Board.

3. **MANDAMUS to Control State Board of Health—License to Practice Medicine.**—If a state board of health, against all the rules and the great weight of evidence, arbitrarily refuses to grant a license to an applicant to practice medicine, mandamus will lie to compel it to do so. (Mo.) *State v. Adcock*, 681.

4. **MANDAMUS to Control State Board of Health.**—A state board of health is clothed only with administrative and discretionary powers, and an unwarranted exercise of that discretion is a subject for review by mandamus. (Mo.) *State v. Adcock*, 681.

5. **MANDAMUS to Control State Board of Health—License to Practice Medicine.**—If a state board of health, against the great weight of the evidence, arbitrarily refuses to grant a license to an applicant to practice medicine, there is no remedy by appeal, and the only remedy is by mandamus. (Mo.) *State v. Adcock*, 681.

6. **MANDAMUS to Control State Board of Health.**—A state board of health has merely administrative and ministerial duties to perform, and cannot act arbitrarily, nor against the great weight of the positive testimony, upon a given question, and if it does so act, the person aggrieved has redress by means of the writ of mandamus. (Mo.) *State v. Adcock*, 681.

MARK.

See Wills, 1.

MARRIAGE.

1. **MARRIAGE AND DIVORCE—Prohibited Marriages.**—Under a statute prohibiting and declaring null marriages between persons who are divorced for adultery and their accomplices therein, a marriage between one who has been divorced for adultery and the accomplice

therein with knowledge of the marriage is absolutely void and without civil effects. (La.) Succession of Gabisso, 529.

2. CONSTITUTIONAL LAW—Prohibited Marriages.—A constitutional provision prohibiting marriages between certain persons is self-acting, if there is no other provision in the constitution limiting its operation. (La.) Succession of Gabisso, 529.

3. MARRIAGE—Validity—Conflict of Laws.—If a citizen and resident of one state, whose status is governed by its laws, goes into another state and there contracts a marriage, which, from considerations of morality and public policy, he is prohibited from contracting at home, such marriage is void in the state of his domicile. (La.) Succession of Gabisso, 529.

4. MARRIAGE—Validity—Limitations.—The plea of prescription cannot avail to sustain or protect an absolutely void marriage contracted in contravention of public policy and good morals and not susceptible of ratification. (La.) Succession of Gabisso, 529.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

Safe Place to Work.

1. MASTER AND SERVANT—Safe Place in Which to Work.—The duty imposed upon the master to furnish his servant a safe place in which to work applies only when the place is permanent in its character, and has been prepared or selected by the master himself, or by others upon whom have devolved the discharge of the master's obligation in this respect, and such duty is not imposed where the servant is engaged in making a place safe that is known to be dangerous, or putting an insecure place in condition for the resumption of use. (Colo.) *Maloney v. Florence etc. R. R. Co.*, 180.

2. MASTER AND SERVANT—Safe Place in Which to Work—Assumption of Risks.—If railroad employes are engaged in the night-time in removing a landslide from a railroad track, and while so engaged some of them are killed by a large rock falling upon them, they necessarily assume the incidental risks of the employment in which they are engaged, and the doctrine of a safe place in which to work has no application. (Colo.) *Maloney v. Florence etc. R. R. Co.*, 180.

3. MASTER AND SERVANT—Safe Place—Assumption of Risks—Negligence of Fellow-servant.—Railroad employes engaged in the night-time in removing a landslide from a railroad track assume the risk of the employment they are engaged in, and if the section foreman or the roadmaster is negligent in representing the place to be safe, it is the negligence of a fellow-servant, for which the railroad company is not liable. (Colo.) *Maloney v. Florence etc. R. R. Co.*, 180.

4. RAILROADS—Master and Servant—Safe Place to Work in.—The duty of the master to furnish the servant a safe place to work in is nothing more than one of the implied obligations of the contract, and is not a duty arising from the general relation which a railroad company occupies toward the public, or toward the servant as one of the public. (La.) *Travis v. Kansas City etc. R. R. Co.*, 526.

5. MASTER AND SERVANT—Safe Place to Work in.—The question of what light shall be furnished to an employe to work by on the premises of the employer is one strictly between the employe as

such and the employer as such, independent of any duty which the employer may owe to the public. (La.) *Travis v. Kansas City etc. R. R. Co.*, 526.

Assumption of Risks.

6. MASTER AND SERVANT—Assumption of Risks—Pleading.—A denial of allegations that a servant did not know the dangerous character of the work in which he was injured, was not warned of it, and did not assume the risk, is sufficient to raise the issue of assumption of risk. (S. C.) *Shirley v. Abbeville Furniture Co.*, 952.

7. MASTER AND SERVANT—Assumption of Risks—Instructions.—A request for an instruction "that a servant has the right to assume without inquiry or examination that the appliances furnished him are safe and suitable," calls for a statement of the law as to the assumption of risks of known defects and dangers, and the person asking such instruction cannot complain because a charge on the assumption of risk is given. (S. C.) *Shirley v. Abbeville Furniture Co.*, 952.

Minor Employés.

8. MASTER AND SERVANT—Minor Employé—Fellow-servant. A section boss whose duty it is to keep rollers oiled, and whom employés under him must obey, is not a fellow-servant of an infant who comes in contact with dangerous machinery under the order of such section boss in connection with the oiling of such rollers. (S. C.) *Tucker v. Buffalo Cotton Mills*, 957.

9. MASTER AND SERVANT—Minor Employé—Safe Place to Work.—If a minor visitor, in a mill by permission, is called upon by a section boss to aid him in the performance of a duty which he, representing the master, owes to an employé, the visitor becomes an employé as to that particular work, and it becomes the duty of the master to furnish him a safe place to work. (S. C.) *Tucker v. Buffalo Cotton Mills*, 957.

10. MASTER AND SERVANT—Minor Employé—Assumption of Risks—Negligence of Fellow-servant.—If a servant is injured in consequence of working in an unsafe place and outside the scope of his employment, where he has gone on the order of a mere fellow-servant, not authorized by the master to assign his place of labor, the master is not liable, and this rule applies to a minor employé unless he is of such immature age as not to appreciate the danger to which the fellow-servant's negligence subjects him. Whether he is of such age is clearly a question of fact for the jury. (S. C.) *Shirley v. Abbeville Furniture Company*, 952.

11. MASTER AND SERVANT—Minor Employés—Assumption of Risks.—The master is held to a stricter account to a servant of tender years than to an adult servant and if the master, or one authorized to assign the place of work, sets a servant of tender years to work on a machine which he has not the capacity to operate by reason of his youth, the master is liable for any resulting injury, but it is a question for the jury to determine whether the child was of sufficient intelligence to be chargeable with the assumption of risk, the presumption being against want of capacity. (S. C.) *Shirley v. Abbeville Furniture Co.*, 952.

See Constitutional Law, 26.

MINORS.

See Infants.

MORTGAGES.

1. **MORTGAGE AND NOTE to be Construed Together.**—A promissory note and the mortgage given to secure it must be read in connection with each other and as constituting one contract. (Cal.) *Hall v. Jameson*, 137.

2. **LIMITATIONS OF ACTION for Balance Due upon a Note and Mortgage.**—When a note and mortgage are given, with power to the mortgagee on default in payment of interest, to sell the premises at public auction, and out of the proceeds of the sale to pay such note and costs, and default being made, the sale follows, realizing only part of the debt, the time for bringing an action for the balance due is still controlled by the terms of the note, and the statute of limitations does not commence to run thereon until the note becomes due according to the promise contained therein. (Cal.) *Hall v. Jameson*, 137.

3. **MORTGAGES—Foreclosure—Rents and Profits.**—A purchaser at foreclosure sale acquires by his deed all of the interest of the mortgagor in the mortgaged property, and the grantee of such purchaser in possession of the premises as owner in fee is not liable to a junior encumbrancer for rents and profits when such encumbrancer does not seek to redeem. (Neb.) *City of Lincoln v. Lincoln St. Ry. Co.*, 816.

4. **MORTGAGES—Foreclosure—Description of Property.**—A description of property in a decree of foreclosure as "the power-house on Ninth street," if the identity of the property can be readily ascertained by parol evidence, is a sufficient description to sustain the decree. (Neb.) *City of Lincoln v. Lincoln St. Ry. Co.*, 816.

See Trusts.

MUNICIPAL CORPORATIONS.*In General.*

1. **CITY BOUNDARIES.**—A Statute Extending the Boundaries of a city and annexing new territory thereto is within the power of the legislature to enact. (Tenn.) *Malone v. Williams*, 1002.

2. **MUNICIPAL CORPORATIONS—Power to Engage in Manufacture.**—A city has no power to engage in the business of brick-making without an express grant, when it is not essential or indispensable to the declared objects and purposes of the corporation, and when the needed brick can be purchased in the open market. (Mich.) *Attorney General v. Common Council*, 625.

Police Power.

3. **POLICE POWER.**—A Statute Authorizing the Officers of a City, within the city and for ten miles beyond its limits, to enter and examine all buildings and ascertain their condition for health or safety, to remove such as are dangerous, to direct and regulate the construction of fire walls, fences, smokestacks, etc., and authorizing the president of a commission having control of the city to abate in a summary manner any nuisance, whenever in his opinion one exists, at the cost of the owner of the premises, violates the rule that no man shall be deprived of life, liberty, or property without due process of law. (Tenn.) *Malone v. Williams*, 1002.

4. **POLICE POWER—Cow Stables and Piggens.**—The legislature cannot empower a city to prohibit by ordinance piggens, cow stables, and dairies for two miles beyond the city limits. (Tenn.) *Malone v. Williams*, 1002.

5. POLICE POWER—Exercise by City Beyond Its Limits.—A statute is unconstitutional which provides that a city may have and exercise, within its limits and for two miles outside thereof, all governmental and police powers. (Tenn.) *Malone v. Williams*, 1602.

See Schools.

NAVIGABLE WATERS.

See Collisions; Waters and Watercourses, 6, 7.

NECESSARIES.

See Husband and Wife.

NEGLIGENCE.

Leaving Horse in Street.

1. NEGLIGENCE—Leaving Team in Public Street.—Leaving a very gentle team upon the public street restrained by a fifty-six pound weight connected by straps to the bridle-bits is not negligence per se, for which the owner of the team is liable for mischief done by the team in running away. The question whether such act is due care or negligence is for the jury to determine from all the facts and circumstances surrounding the transaction. (Colo.) *Caughlin v. Campbell-Sell Baking Co.*, 158.

2. NEGLIGENCE—Leaving Horse in Street.—The owner of a gentle horse who leaves it standing in a public street, fastened as an ordinarily prudent man would fasten it in like circumstances, is not responsible for whatever injuries may occur if the horse breaks loose. (Colo.) *Caughlin v. Campbell-Sell Baking Co.*, 158.

3. NEGLIGENCE—Leaving Horse in Public Street.—A person who leaves his horse in a public street or highway must use ordinary care and prudence in fastening or restraining it so as to prevent injury. (Colo.) *Caughlin v. Campbell-Sell Baking Co.*, 158.

Proximate Cause.

4. NEGLIGENCE—Proximate Cause.—If a horse while being driven along a public highway and across a bridge catches his foot in a hole or break in the bridge, from which he cannot extricate it, his position is the direct and proximate result of the negligence of the county, and if the owner, acting as a reasonable and prudent man, goes to the assistance of his horse, and in attempting to rescue him is himself injured by the horse falling on him, his injury is also the proximate result of the negligence of the county. (S. C.) *Cooper v. Richland Co.*, 946.

5. NEGLIGENCE—Proximate Cause.—Under a statute relating to liability for defects in highways, and providing that plaintiff shall not recover when he has in any way brought about the injury or damage by his own act, to bar a recovery the act of the person injured must be the efficient, immediate, and proximate cause of the injury. (S. C.) *Cooper v. Richland Co.*, 946.

Evidence.

6. NEGLIGENCE—When Question for Jury.—The issue of negligence should go to the jury when the facts, which, if true, would constitute evidence of negligence, are controverted, or when the facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn, or when the

4. CORPORATION to Practice Medicine.—Licensed practitioners of medicine may form a corporation to practice medicine, and make valid contracts with their patients therefor in the corporate name. (Neb.) *State Electro-Medical Inst. v. Platner*, 706.

See *Mandamus*, 3-6.

PLEADING.

PLEADINGS.—Evidence Received Without Objection does not have the effect of enlarging the pleadings, when such evidence is admissible under them. (La.) *Rogers v. Southern Fiber Co.*, 537.

See *Equity*.

PLEDGE.

See *Corporations*, 5; *Insurance*, 16-18.

POLICE POWER.

See *Constitutional Law*, 21-31; *Municipal Corporations*, 3-5.

PRESCRIPTION.

See *Adverse Possession*; *Waters and Watercourses*, 9.

PRINCIPAL AND AGENT.

See *Bills and Notes*, 1; *Corporations*, 16-20.

PRINCIPAL AND SURETY.

1. SURETYSHIP—Enforcement of Contribution.—A surety who has paid a judgment against himself and his cosureties may have execution thereon in his favor against one of them who, as to him, is a principal under the statutes. (Ky.) *Sanders v. Herndon*, 493.

2. SURETYSHIP—Contribution—Joint Execution.—A statute requiring that an execution on a joint judgment shall be joint does not prevent a surety who has paid a judgment from having it assigned, and having execution upon it against the principal for the whole of it, or against any of the cosureties for their sharers of it. (Ky.) *Sanders v. Herndon*, 493.

PROBATE COURT.

See *Courts*.

PROBATE PROCEEDINGS.

See *Executors and Administrators*; *Wills*.

PROCESS.

1. JUDGMENT Based on Constructive Service of Process.—The statement in an affidavit for an order for the publication of summons need not show what the persons of whom the plaintiff inquired respecting the place of residence of the defendant told the plaintiff, if it further appears by the affidavit that such defendant cannot be found within the state after diligent search for him by the affiant, and that such search consisted of making inquiries of each and every person

from whom he had reason to believe he would receive knowledge of the whereabouts of the defendant. (Cal.) *Chapman v. Moore*, 130.

2. **A JUDGMENT Based on the Publication of a Summons** against — Whitney and — Whitney, his wife, whose first names are unknown, entered against Florence I. Whitney, an unmarried woman, is void as against her, and may for that reason be set aside on motion made more than three years after its entry, though after the publication, the complaint was amended without notice by inserting her full and true name therein. (Kan.) *Whitney v. Masmore*, 442.

3. **SUMMONS—Immaterial Defect.**—If a defendant is neither deceived nor misled by a sentence contained in a summons as to the time within which he must appear and answer, the summons is sufficient, although it is not strictly within the statutory form. (Idaho) *McKnight v. Grant*, 287.

4. **SUMMONS—Error in Publication.**—If the plaintiff's true name appears in the original summons and complaint and also in the copy thereof mailed to the defendant, but in the summons as published the first two letters of the name "McKnight" are omitted, such mistake is not fatal to the jurisdiction of the court. (Idaho) *McKnight v. Grant*, 287.

5. **SUMMONS—Error in Publication.**—If in a summons as published the word "filed" is omitted from the sentence "You are hereby notified and required to appear in the above-entitled court in the above-entitled cause and answer the complaint of the plaintiff filed herein," this is not a fatal omission or variance if a correct copy of the complaint and summons has been mailed to the defendant. (Idaho) *McKnight v. Grant*, 287.

6. **SUMMONS—Affidavit for Publication of—Diligence.**—If a plaintiff in his affidavit for publication of summons shows clearly that the defendant resides out of the state at the time, it is unnecessary for him to show that he has exercised any further diligence in attempting to find the defendant within the state. (Idaho) *McKnight v. Grant*, 287.

7. **PROCESS—Return—Impeachment.**—The return of an officer as to service of process may be impeached by extrinsic evidence. (Neb.) *Goble v. Brenneman*, 813.

PUBLICATION OF SUMMONS.

See Process.

PUBLIC LANDS.

See Animals, 7-11.

PUBLIC OFFICE.

See Officers.

QUIETING TITLE.

See Abatement.

RAILROADS.

1. **RAILROADS—Negligence—Crossings—Gates and Signals.**—The lowering of gates across the street, where a railroad company is required to keep gates closed while a train is crossing, is a warning

of the dangerous condition of the track at the time, but it does not dispense with the necessity of complying with statutory requirements as to ringing the bell or sounding the whistle, at least thirty seconds before an engine is moved, when it is at a standstill within a less distance than one hundred rods of the crossing. (S. C.) *Weaver v. Southern Ry. Co.*, 934.

2. RAILROADS—Negligence — Crossings — Gates.—Although the lowering of gates across the street while a railroad train is passing does not supersede the necessity of complying with statutory requirements as to sounding a whistle or ringing a bell, nevertheless when the warning which the lowering of such gates gives is ignored, it strongly tends to show gross negligence on the part of the person injured. (S. C.) *Weaver v. Southern Ry. Co.*, 934.

3. RAILROADS—Liability of Lessor for Injury to Employé of Lessee.—In the absence of charter or statutory authority to lease its road, a railroad company is not liable to an employé of the lessee company for a breach of duty arising under the contract of employment, as, for instance, the duty of providing a safe place to work in. (La.) *Travis v. Kansas City etc. R. R. Co.*, 526.

See Carriers.

RECEIVERS.

RECEIVER—Suit Against Himself in Individual Capacity.—It is not a practice to be commended for a person in his representative capacity to sue himself in his individual capacity, as where the receiver of a corporation sues the directors, one of whom is himself. But a bill is not demurrable on that ground alone. (Md.) *Murphy v. Penniman*, 583.

See Bankruptcy, 1.

RECORDS.

See Vendor and Vendee, 1, 2.

RELEASE.

See Torts, 4.

RES JUDICATA.

See Judgments.

RIPARIAN RIGHTS.

See Waters and Watercourses.

RUNAWAY TEAM.

See Negligence.

SALES.

See Carriers, 12-15.

SCHOOLS.

PUBLIC SCHOOLS—Power of City to Establish.—A statute empowering a city to establish public schools within its borders is not unconstitutional. (Tenn.) *Malone v. Williams*, 1002.

SHIPPING.

See Collisions.

SPECIFIC PERFORMANCE.

1. **A JUDGMENT for the Specific Performance of a Contract is not Void**, though the complaint fails to state a good cause of action, where it does state sufficient matter to direct the attention of the court to its merits. (Kan.) *Horner v. Ellis*, 446.

2. **PLACE OF TRIAL of Actions for Specific Performance.**—A suit for specific performance is personal in its nature, and, therefore, must be tried in the county where the defendant resides, though the land which is the subject of the action is located in a different county. (Kan.) *Horner v. Ellis*, 446.

3. **SPECIFIC PERFORMANCE—Prayer for General Relief.**—Where the only prayers in a petition are for specific performance and general relief, the only relief that can be granted is such as is connected with the specific prayer. (Ga.) *White v. Sikes*, 228.

4. **JUDGMENTS—Jurisdiction—Conveyance of Lands in Another State.**—A court of chancery, in a proper case, has power to compel a conveyance of lands situated in another country or state, where such court has jurisdiction of the parties interested. (Neb.) *Fall v. Fall*, 767.

STATE.

1. **SUITS AGAINST STATE.**—A Constitutional Provision that suits may be brought against the state in such manner and in such courts as the legislature may by law direct is not self-executing. (Tenn.) *General Oil Co. v. Crain*, 967.

2. **SUITS AGAINST STATE.**—The Funds or Property, actual or prima facie, of the state of Tennessee, cannot be made the subject of litigation directly by making it a party, nor indirectly by suing one of its officers, save where it has given its consent by express legislation. (Tenn.) *General Oil Co. v. Crain*, 967.

3. **SUIT AGAINST STATE OIL INSPECTOR—Interstate Commerce.**—A suit to restrain a state oil inspector from inspecting oils is in effect a suit against the state, and hence subject to demurrer, although it alleges that the oils in controversy are a part of interstate commerce, and that the inspection statute, as applied to them, is unconstitutional. (Tenn.) *General Oil Co. v. Crain*, 967.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.*Construction of Statutes.*

1. **CONSTRUCTION OF STATUTE.**—While the Legislative History of an act may be consulted as throwing light upon its meaning and purpose, still in determining whether a statute is an independent repealing act or an amendatory act, no controlling force can be attached to the fact that it was first introduced as an independent act and then withdrawn and introduced as an amendatory act, for the

purpose of escaping the prohibition of the sale of liquors in Memphis. (Tenn.) *Malone v. Williams*, 1002.

Title of Statute.

2. CONSTITUTIONAL LAW—Statutes, When Embrace but One Subject.—A statute entitled “An act for the certification of land titles and the simplification of the transfer of real estate” may include provisions for the punishment of the fraudulent procuring of false certificates and of obtaining any false entry thereunder, making the county recorder the registrar and requiring him to perform certain duties as such, fixing his official bond so as to cover such duties, prohibiting him from practicing law, giving the petition to establish the title the effect of *lis pendens*, making the decree final and conclusive, providing that liens are not to become effective on the registered title until their entry on the duplicate in the recorder’s office, excluding from claims to registration those founded in adverse possession, and requiring constructive notice to persons unknown of four weeks, for all those provisions are germane to the general subject expressed in the title, and, taken together, compose a part of a general scheme, and are appropriate to effect the main object of the law. (Cal.) *Robinson v. Kerrigan*, 90.

3. CONSTITUTIONAL LAW—Title of Statutes.—When the title of a statute contains one general subject, which is clearly expressed, such as “To prohibit the sale of liquor on Sunday,” it may in the body include a provision for all matters germane and referable to that subject. (Ala.) *Beauvoir Club v. State*, 82.

4. CONSTITUTIONAL LAW—Title of Statute.—The subject of penalizing the keeping open of a barroom or other place for the sale of liquors on Sunday is included in the general title of a statute, “To prevent the sale of liquor on Sunday.” (Ala.) *Beauvoir Club v. State*, 82.

5. CONSTITUTIONAL LAW—Title of Statute—Preservation of Nongame Birds.—The title of an act entitled “For the protection of birds other than game birds and their nests, eggs, and to provide a penalty,” sufficiently states the object of the statute, and is broad enough to cover a provision that no person within the state shall kill, catch, or have in his possession, living or dead, any resident or migratory wild bird other than a game bird, or purchase, offer, or expose for sale any such bird after it has been killed or caught, and that no part of the plumage, skin or body of any bird protected by the statute shall be sold or had in possession for sale, and this irrespective of whether such bird was captured or killed within or without the state. (La.) *In re Schwartz*, 516.

6. CONSTITUTIONAL LAW—Title of Statute—Preservation of Nongame Birds.—If the title to a statute reads that it is “for the protection of birds other than game birds, and to provide a penalty,” and the statute makes it a crime for anyone within the state to kill, catch or have in his possession, living or dead, any resident or migratory wild bird other than a game bird, or to purchase, offer, or expose for sale any such wild nongame bird, or any part thereof, after it has been killed or caught, such title of the act is notice to those who deal in feathers that the commerce that is death to nongame birds must cease, and such statute is not directed against any particular industry. (La.) *In re Schwartz*, 516.

7. TITLE OF STATUTE—Amendatory or Repealing Act.—If the caption of an act shows that it was intended by the legislature as an amendatory act, while the body shows it, in direct or express terms,

to be a repealing act, the act is void. (Tenn.) *Malone v. Williams*, 1002.

8. **TITLE OF STATUTE—Amendatory or Repealing Act.**—The Opinion of the Legislature expressed in the title of an act that it is amendatory is not conclusive. Whether the act amends or repeals another is a judicial question to be determined from the body of the act. (Tenn.) *Malone v. Williams*, 1002.

9. **REPEAL OF STATUTE.**—An Act Embracing a Full Scheme of legislation upon a subject operates as a repeal of prior acts on the same subject. (Tenn.) *Malone v. Williams*, 1002.

10. **TITLE OF STATUTE—Amendatory or Repealing Act.**—A statute whose caption purports an amendment of a city charter, but whose body embraces a new charter, and therefore really operates as a repeal of the prior charter, offends the constitutional provision that the subject of an act shall be expressed in its caption. (Tenn.) *Malone v. Williams*, 1002.

11. **TITLE OF STATUTE.**—An Act to Modify and Change in certain respects the form of government of the city of Memphis and to amend its existing charter'' cannot properly include provisions relative to state and county revenue, provisions giving the city exclusive authority to license ferries within its borders, and provisions authorizing the mayor to abate nuisances within a radius of ten miles beyond the city limits. (Tenn.) *Malone v. Williams*, 1002.

See Constitutional Law.

SUICIDE.

See Beneficial Associations, 3-11; Insurance, 15.

SUMMONS.

See Process.

SUNDAY.

1. **CONTRACTS Made on Sunday—Legality—Conflict of Laws.**—A contract executed and delivered to the agent of a foreign corporation in Michigan on Sunday is void, and cannot be enforced by such corporation organized and having its domicile in another state. (Mich.) *International Text-book Co. v. Ohl*, 612.

2. **CONTRACTS Made on Sunday—Legality—Conflict of Laws.**—A statute which prohibits, and makes illegal, the doing of all work except works of necessity or charity on Sunday is not merely directed against the making of contracts as such, but the mere fact that an act done on Sunday finally results in a contract made outside the state does not exempt it from the operation of the law. (Mich.) *International Text-book Co. v. Ohl*, 612.

3. **CONTRACTS—Validity—Conflict of Laws.**—The rule that the validity of contracts is to be determined by the law of the place where they are entered into is subject to the limitation that each state may, within constitutional limits, such as the passage of a Sunday law, determine the legality of all undertakings entered into within its own borders. (Mich.) *International Text-book Co. v. Ohl*, 612.

4. **CONTRACTS Made on Sunday—Estoppel.**—A person who enters into an illegal contract on Sunday is not estopped from asserting that the undertaking was entered into on that day, from the fact

that it bears date as of a preceding day, when the precise facts are known to the other party to the contract. (Mich.) *International Text-book Co. v. Ohl*, 612.

See *Intoxicating Liquors*, 4-8.

SURETYSHIP.

See *Principal and Surety*.

TAXATION.

In General.

1. **TAXATION—Value of Property.**—The Supreme Court cannot on appeal review or revise the amount of valuation placed upon property by tax officials. (Md.) *Consolidated Gas Co. v. Mayor etc.*, 553.

2. **TAXATION—Methods of Assessor.**—Upon Appeal from an assessment made by the appeal tax court, the members of that court may be asked what were their methods and mental processes in arriving at the valuation. (Md.) *Consolidated Gas Co. v. Mayor etc.*, 553.

3. **TAXATION—Burden of Proof.**—The presumption is that the determination of the assessor is correct, and to relieve himself from an assessment it is incumbent on the person assessed to show clearly that the assessment was erroneous. (N. Y.) *People v. Wells*, 840.

4. **TAX SALE—Due Process.**—A Statute Providing that No Error in any assessment, tax-book, notice, advertisement, etc., relating to the assessment, levy, or collection of taxes in the city of Memphis, shall affect the validity of any sale or other proceeding for their collection, is in violation of the rule that no man shall be deprived of life, liberty, or property without due process of law. (Tenn.) *Malone v. Williams*, 1002.

Equality and Uniformity.

5. **TAXATION.**—The Inequality of an Assessment which will invalidate it must be predicated as of the valuation of property to which a common standard of valuation may be made. Hence an assessment on the easement of a gas company in the street is not rendered "unequal" by the fact that it is not in proportion to the valuation of other real property. (Md.) *Consolidated Gas Co. v. Mayor etc.*, 553.

6. **TAX SALE—Discrimination Against Claimant.**—A statute providing that if any person claiming title to land in the city of Memphis under a tax deed shall be defeated in an action to recover the premises, the successful claimant shall pay such person the amount paid by the purchaser at the tax sale and any amounts paid by him for taxes, with interest thereon, together with costs, is unconstitutional. (Tenn.) *Malone v. Williams*, 1002.

7. **TAXATION—Discrimination in Favor of Corporate Stock.**—A statute making taxes on shares of stock delinquent on the first day of September, but making taxes on other kinds of property delinquent on July 1st, is unconstitutional as an unreasonable discrimination in favor of the owners of stock. (Tenn.) *Malone v. Williams*, 1002.

8. **TAXATION—Inequality—Adding Expense of Survey.**—A statute requiring the owners of property in the city of Memphis not laid off in lots or blocks to furnish the assessor a description thereof, and providing that if they fail to do so he may require the city engineer to make a survey, the expense of which shall be added to the tax levied on the property, violates the constitutional provisions that all

property shall be taxed according to its value, and that taxes shall be equal and uniform throughout the state. (Tenn.) *Malone v. Williams*, 1002.

Property Taxable and Situs Thereof.

9. **TAXATION—Capital Employed in the State—Proceeds of Sales of Property Imported by a Foreign Corporation.**—Cash and bills receivable belonging to a foreign corporation and resulting from sales of property imported by it represent capital employed within the state within the meaning of the tax laws of New York. (N. Y.) *People v. Wells*, 840.

10. **TAXATION—Situs of Property.**—For the Purpose of Taxation of Promissory Notes and Similar Instruments for the payment of money, where the debt is inseparable from the paper which declares and constitutes the debt, the situs, for the purposes of taxation, is the place where they are actually and physically held. (N. Y.) *People v. Wells*, 840.

11. **TAXATION of Property Resulting from the Sales in Original Packages Imported by a Foreign Corporation.**—Cash and bills receivable resulting from sales of property imported by a foreign corporation and sold in the original packages are subject to taxation within the state where such cash and bills receivable may be found, provided they are not in the course of transmission to the home office. (N. Y.) *People v. Wells*, 840.

Easement of Gas Company and Value Thereof.

12. **TAXATION—Easement of Gas Company—Bonded Indebtedness.**—In fixing the value for purposes of taxation of the easement of a gas company in the streets of a city, it is error, whether the result is reached directly or indirectly, to treat the bonded indebtedness of the company as an asset, when the statutes provide that such indebtedness is to be valued and assessed for taxation to the owners thereof in the county where they reside. (Md.) *Consolidated Gas Co. v. Mayor etc.*, 553.

13. **TAXATION—Expert Testimony as to Property Values.**—One who has been a student of taxation for many years, who has been called upon to value the easements of public service corporations in various cities, and who knows the character and extent of the property and operations of a gas company and what have been its earnings, is qualified to testify as an expert as to the value of the easement of the company in the streets, although he has no knowledge of the sales of real estate in the city. (Md.) *Consolidated Gas Co. v. Mayor etc.*, 553.

14. **TAXATION—Expert Testimony of Values.**—To Qualify a Person to testify as an expert concerning the value of the easement of a gas company in the streets, it is not necessary that he should be conversant with real estate values in the vicinity. (Md.) *Consolidated Gas Co. v. Mayor etc.*, 553.

15. **TAXATION—Fixing Value of Easement of Gas Company.**—The appeal tax court, cannot lawfully assess the easement of a gas company in the streets of a city by estimating by the unit rule, or otherwise the gross value of all the property and assets of the company and then eliminating the other classes of property and treating the residuum as the assessed value of the easement. (Md.) *Consolidated Gas Co. v. Mayor, etc.*, 553.

Special Taxation—Railroad Right of Way.

16. **TAXATION, SPECIAL—Street Improvement—Railway Right of Way.**—Under a city charter expressly providing that all property within a defined district to be benefited shall be subject to special taxes for street improvement therein, railroad rights of way within such district are subject to such taxes. (Mo.) *Heman Construction Co. v. Wabash Railroad Co.*, 649.

17. **TAXATION, SPECIAL—Railroad Right of Way—Public Highways.**—A railroad right of way is not a public highway within the meaning of a constitutional provision exempting public highways from taxation, so as to exempt it from special taxes for local improvements within a city. (Mo.) *Heman Construction Co. v. Wabash R. R. Co.*, 649.

18. **TAXATION, SPECIAL—Railroad Right of Way—Lien for Taxes.**—Under a city charter expressly providing that all property within a defined district to be benefited shall be subject to special taxes for street improvements therein, an assessment and tax bill for such purpose against a railroad right of way therein is a lien thereon. (Mo.) *Heman Construction Co. v. Wabash R. R. Co.*, 649.

Enforcement of Taxes—Sales and Redemption.

19. **DISTRAINT FOR TAXES—Class Legislation.**—A statute permitting tax officers in one city of the state to distrain, under certain circumstances, for taxes not delinquent, when nowhere else in the state are they permitted to distrain for taxes unless delinquent, creates an unconstitutional discrimination in favor of that city. (Tenn.) *Malone v. Williams*, 1002.

20. **TAXATION—Due Process of Law.**—A statute authorizing the enforcement of personal taxes, whether delinquent or not, by distress and sale of personal property, in case the one against whom the assessment is made has removed, or is about to remove, himself or his personal property from the city, violates the constitutional principle that no man shall be deprived of life, liberty, or property without due process of law. (Tenn.) *Malone v. Williams*, 1002.

21. **CONSTITUTIONAL LAW—Tax Sales—Due Process.**—A statute authorizing a foreclosure of the lien of the state for unpaid taxes and a sale of the property without service of process is constitutional and valid. (Mich.) *Toolan v. Longyear*, 603.

22. **TAX DEEDS—Title Conveyed.**—If lands are sold and bid in by the state for the nonpayment of taxes, and afterward regularly conveyed by it to a purchaser, the title conveyed is a title in fee. (Mich.) *Toolan v. Longyear*, 603.

23. **TAX SALES—Redemption.**—A constitutional provision granting to the owner of real estate sold for the nonpayment of taxes, or special assessments of any character whatever, the right of redemption for a period of two years from the date of sale, is self-executing, and a junior lienholder is not entitled to a decree ordering the sale of such real estate, without the right of redemption. (Neb.) *City of Lincoln v. Lincoln St. Ry. Co.*, 816.

TELEGRAPHS AND TELEPHONES.

1. **TELEGRAPH COMPANY—Liability for Mental Suffering.**—Where the delivery of a telegram conveying information of the expected death of a brother of the addressee is negligently delayed until after the death occurs, the telegraph company is liable in damages for the mental suffering its negligence occasions the addressee. (Ky.) *Western Union Tel. Co. v. Lacer*, 502.

2. TELEGRAPH COMPANY—Conflict of Laws.—Where a telegram is sent from a town in Indiana to a city in Kentucky, and in course of the transmission in Indiana the name of the addressee is altered so that the delivery of the message in Kentucky is delayed, the breach of contract occurs in Kentucky, and the action by the addressee for damages is governed by the law of that state. (Ky.) *Western Union Tel. Co. v. Lacer*, 502.

3. TELEGRAPH COMPANY—Liability for Physical and Mental Pain.—Where a telegraph company negligently delays the delivery of a telegram calling a physician, it is not liable for the physical and mental suffering of the sick person during the delay, for its negligence is not the proximate cause of the suffering. (Ga.) *Seifert v. Western Union Tel. Co.*, 210.

TENANTS IN COMMON.

See Ejectment.

THEATERS.

1. THEATERS—Right to Regulate and License.—The state has a right by statute to regulate a theater as a place of public amusement, and may require a license fee for the privilege of conducting the business. (Ill.) *People v. Steele*, 321.

2. THEATERS—Right to License and Regulate.—The legislature has the same authority over the theater business as over any other lawful private business, and no more. Besides the requirement of a license, it may interfere with and regulate the business to the extent that the public health, safety, morality, comfort and general welfare require. (Ill.) *People v. Steele*, 321.

3. THEATERS—License Fee—Change in Character of Business.—The requirement of a license fee for the privilege of conducting a theater does not change the character of that business from a private one to one impressed with a public interest. (Ill.) *People v. Steele*, 321.

4. CONSTITUTIONAL LAW—Scalping Theater Tickets.—A statute prohibiting the sale of a ticket by a manager of a theater without the requirement on its face that it shall not be resold at an advance, prohibiting the sale of a ticket at an advance, and prohibiting the keeping of a place for such sale, is not a valid exercise of the police power, and is unconstitutional and void as imposing arbitrary and burdensome restrictions, not required by the public welfare, upon the right of the theater manager as to the manner in which he must conduct his business, and the contracts he shall make in carrying it on, and as prohibiting a broker from selling at a profit the tickets which it is his business to sell, and as depriving both of their property and liberty without due process of law. (Ill.) *People v. Steele*, 321.

TICKET SCALPING.

See Theaters, 4.

TITLE OF STATUTE.

See Statutes, 2-11.

TORRENS LAND ACT.

See Constitutional Law, 15-20.

TORTS.

1. JOINT TORT-FEASORS—Several Verdict.—When two or more persons are charged with a joint tort, and all are found guilty, the jury cannot assess several damages. The damages must be assessed jointly, against all jointly, although all may not be equally culpable. (Tenn.) *Nashville Ry. etc. Co. v. Trawick*, 996.

2. JOINT TORT-FEASORS—Several Verdict, How Corrected.—When the jury returns a several instead of a joint verdict against joint wrongdoers, the irregularity may be cured by the plaintiff taking judgment against one of them in the amount awarded against him by the jury, and entering a nolle prosequi as to the others. (Tenn.) *Nashville Ry. etc. Co. v. Trawick*, 996.

3. JOINT TORT-FEASORS—Several Verdict, How Cured.—A several verdict against two joint wrongdoers can be cured by the court, on motion of the plaintiff, even after judgment is entered, dismissing the case as to one defendant, after granting a new trial as to him, and rendering judgment against the other alone for the amount of the verdict awarded against him. (Tenn.) *Nashville Ry. etc. Co. v. Trawick*, 996.

4. JOINT TORT-FEASORS—Effect of Release of One.—When some of the directors of a corporation have been guilty of misfeasance, the losses from which can be accurately ascertained, and the receiver of the company executes a release under seal to some of them, when the use of the seal is unauthorized by the court and the intention is not to discharge the other directors, the latter are not released from liability. (Md.) *Murphy v. Penniman*, 583.

TRIAL.

1. JURY TRIAL—Omission to Instruct the Jury as to a Matter of Common Knowledge.—The refusal of the court to instruct the jury that the rate of interest by virtue of the statute is six per cent per annum cannot be excused and a reversal avoided, on the ground that such instruction was unnecessary, as it merely stated what is a matter of common knowledge. (Kan.) *New York Life Ins. Co. v. Martindale*, 362.

2. TRIAL—Instructions—Charge on Facts.—If a request to charge the jury that if it finds that plaintiff was not authorized by defendant to go to and put his hand near the machinery, he was a trespasser, is modified by the court by adding that, "in this particular case plaintiff was a person of tender years," and submitting his capacity to commit trespass to the jury, the whole charge is not upon the facts, nor is the issue as to trespass taken from the jury. (S. C.) *Tucker v. Buffalo Cotton Mills*, 957.

3. TRIAL—Instructions.—A request for a charge which intimates to the jury the inference to be drawn from the facts therein stated in detail is a charge on the facts and should not be given. (S. C.) *Weaver v. Southern Ry. Co.*, 934.

See Criminal Law.

TRUSTS.

1. TRUSTS—Purchase of Lands.—A purchase of real estate completed on the credit of two, and afterward paid for wholly by one

of them, does not, of itself, give rise to a resulting trust in favor of the other. (Neb.) *Norton v. Brink*, 822.

2. **TRUSTS—Establishment.**—The claim that title to land is held in trust is one which must be made in a court of equity. (Mich.) *Sanborn v. Loud*, 614.

3. **TRUST—Legal Title, When Vests in the Beneficiary.**—A conveyance to one person in trust for another vests the legal title in the beneficiary under the code of Alabama. (Ala.) *Hinton v. Farmer*, 63.

4. **TRUSTEE, Note Executed by, When Makes Him Personally Liable.**—A note in the ordinary form containing a personal promise to pay, and signed W. H. J., trustee, is his personal obligation, upon which a judgment may be recovered against him. (Cal.) *Hall v. Jameson*, 137.

5. **TRUSTEE, When Personally Liable upon a Note and Mortgage.**—If a trustee executes a note which he subscribes as trustee and a mortgage to secure its payment, he having no power to bind anyone but himself by his promise for the payment of the money, though he has power to mortgage the trust property, he is personally liable on the note and the covenant for the payment of the money, though the mortgage refers to the trust and shows the intent to pledge trust property. (Cal.) *Hall v. Jameson*, 137.

6. **THE POWER OF A TRUSTEE to Mortgage does not Include the Power to Make a Personal Promise on behalf of the beneficiaries of the trustor that they or either of them should pay the money.** (Cal.) *Hall v. Jameson*, 137.

7. **TRUST DEEDS—Right of Trustees to Recover Rent.**—If a trust deed is made subject to a lease without any reservation of rent, but with an express provision that the trustees shall collect the rent and apply it to the trusts therein declared, they are entitled to recover the rent. (Ill.) *Reichert v. Missouri etc. Coal Co.*, 307.

8. **TRUST DEEDS—Trustees as Joint Tenants.**—Trustees are excepted from the provision of the statute requiring a declaration in a conveyance that the estate is held in joint tenancy, and unless there is a provision to the contrary in a trust deed, they hold as joint tenants, and, upon the death of one, the administration of the trust devolves upon the survivor, and nothing passes to the heir or personal representative of the deceased trustee. (Ill.) *Reichert v. Missouri etc. Coal Co.*, 307.

9. **TRUSTS—Legal Estate Taken by Trustee.**—A trustee takes precisely that quantum of the legal estate which is necessary to the discharge of his declared powers and duties, regardless of technical terms ordinarily required for the conveyance, and such estate will inure to the trust until the active trusts are accomplished, when the statute of uses will execute the use, and the entire title, both legal and equitable, will be in the one beneficially interested. (Ill.) *Reichert v. Missouri etc. Coal Co.*, 307.

10. **TRUSTS AND TRUSTEES—Filling Vacancies.**—One who creates a trust has a right to provide a method for filling vacancies and for the appointment of successors in trust. (Ill.) *Reichert v. Missouri etc. Coal Co.*, 307.

11. **TRUSTS AND TRUSTEES—Filling Vacancies—Construction of Trust Deed.**—If a trust deed conveys an estate to trustees, "their successors and assigns," and provides for the appointment of successors in trust to whom the estate shall go, and that upon the appointment of a new trustee, the real estate shall "thereupon be con-

veyed, assigned and transferred in such manner as to legally and effectually vest the same in the acting trustee," such provision simply means that upon the appointment of a new trustee the estate shall thereupon be deemed to be conveyed and transferred to him, without a conveyance being executed by anyone. (Ill.) Reichert v. Missouri etc. Coal Co., 307.

12. **TRUSTS—Bond for Beneficiaries—Collateral Inquiry.**—In a suit by trustees to recover rent from lessees of the trust estate, the question whether the trustees have given the required bond to the beneficiaries does not concern such lessees, and cannot be collaterally inquired into. (Ill.) Reichert v. Missouri etc. Coal Co., 307.

13. **TRUSTS—Parties—Death of Beneficiary.**—In an action by trustees to recover rent from lessees of the trust estate, the death of a beneficiary, who is not a party to the suit, does not affect the right to prosecute the suit. (Ill.) Reichert v. Missouri etc. Coal Co., 307.

See Attachment.

USURY.

1. **USURY—Defense Against.**—Honest belief by the holder of a note in his legal right to collect compound and usurious interest under the terms of his note, is no defense to the penalty imposed by law against usury. (S. C.) Plyler v. McGee, 950.

2. **USURY—Recovery of Usurious Interest Paid.**—If a note containing usury has been assigned before maturity, to an innocent purchaser, and the defense of usury thereby cut off, and compelling the maker to pay the note to the assignee, the usurious interest paid may be recovered of the assignor. (Ill.) Culver v. Osborne, 302.

3. **USURY—Recovery of Usurious Interest.**—If a note is given upon usurious interest and passes into the hands of a bona fide purchaser before maturity without notice of the usury, and is by him collected, the payment by the maker to the assignee is regarded as compulsory and not voluntary, and equity will require the original payee to pay to the maker the usurious interest included in the note. (Ill.) Culver v. Osborne, 302.

VENDOR AND VENDEE.

1. **VENDOR AND PURCHASER—Constructive Notice.**—A purchaser is bound by constructive notice of all recorded instruments and the recitals therein lying within his chain of title; but a deed or instrument lying outside his chain of title imports no notice to him. (Mo.) Gross v. Watts, 662.

2. **VENDOR AND PURCHASER—Actual Notice of Mortgage—Evidence.**—If the purchaser has actual knowledge of the existence of a mortgage on the premises before he purchases and pays for the land, such mortgage is admissible in evidence in an action to foreclose it. (Mo.) Gross v. Watts, 662.

See Frauds, Statute of.

VERDICT.

VERDICT.—Affidavits of Jurors cannot be Received to impeach their verdict. (Colo.) Richards v. Sanderson, 167.

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WARRANTS.

See Counties.

WATERS AND WATERCOURSES.

Contracts to Furnish Water.

1. **CONTRACTS to Furnish Water.**—If, under a contract to furnish water for irrigation, the irrigation company may itself determine as to when the water shall be furnished and in what quantities, and it is also stipulated that such company shall not be liable for failure to furnish water, when such failure is caused by a deficiency of water at its source of supply, accidents to machinery, injuries to canal, or other failures or accidents over which the company has no control, the control vested in it is accompanied by a corresponding measure of liability, and is exercised at its peril, and an allegation that, having control of the water, such company failed to furnish it on proper demand, and that plaintiff thereby lost his crop, discloses a legal cause of action which, if sustained by proof, justifies a recovery, unless the company can by proof bring itself within one of the exceptions named in the contract exempting it from liability. (La.) *Mathieu v. North American etc. Co.*, 548.

2. **CONTRACTS to Furnish Water—Notice.**—If a contract to furnish water for irrigation stipulates that the irrigation company shall be entitled to written notice for a certain time before water will be required on the premises, no recovery can be had for failure to furnish water, in the absence of allegation and proof that the required notice was given, unless there is an acknowledgment on the part of the company of inability to comply with its obligations to furnish the water. (La.) *Mathieu v. North American etc. Co.*, 548.

Riparian Rights.

3. **RIPARIAN RIGHTS—Common-law Doctrine.**—Under the common law the title to the bed of all fresh-water rivers, above the ebb and flow of the tide, whether navigable or non-navigable, where the river forms the boundary between adjoining owners, is in the riparian owner to the thread of the stream and this law is in force in Nebraska. (Neb.) *Kinkead v. Turgeon*, 740.

4. **RIPARIAN RIGHTS—Common-law Doctrine.**—The common law with reference to riparian ownership in navigable streams is not inconsistent with the constitution of the United States, nor with the constitution and statutes of Nebraska, and hence the riparian owner takes title to the thread of the stream. (Neb.) *Kinkead v. Turgeon*, 740.

Title to Bed of Stream and Accretions.

5. **RIPARIAN RIGHTS—Accretions.**—The rights of riparian owners upon a navigable river to land formed by accretion are the same as if the river were not navigable, and the rules of the common law apply in full force. (Neb.) *Kinkead v. Turgeon*, 740.

6. **RIPARIAN RIGHTS—Title to Bed of Navigable Stream.**—A riparian owner of lands on a navigable stream above the ebb and flow of the tide takes title to the thread of the stream, and if such river suddenly changes its channel and leaves its old bed, he still holds to the thread of the channel where the waters flowed. (Neb.) *Kinkead v. Turgeon*, 740.

7. RIPARIAN RIGHTS—Title to Bed of Navigable Stream.—A riparian owner upon the bank of a navigable stream, though he takes title to the thread thereof, cannot exercise dominion over its waters or bed in any manner inconsistent with or opposed to the public easement of passage; but when by reason of natural changes the stream abandons its old bed and seeks a new one, the right of passage over the old bed is abandoned and such bed reverts to the riparian owner to the thread of the channel where the waters flowed. (Neb.) *Kinhead v. Turgeon*, 740.

Surface Waters.

8. WATERS, SURFACE—Rights of Dominant Estate.—A land owner has the right to have the surface water which flows from his farm follow its natural course. If that takes it across the lands of an adjoining owner, the latter has no right to interrupt this flow of the water in its natural course or direction. (Mich.) *Launstein v. Launstein*, 635.

9. WATERS, SURFACE—Prescriptive Right.—An easement may be acquired by prescription by which the water collected upon the lands of the upper proprietor may be allowed to overflow the lands of an adjacent proprietor. (Mich.) *Launstein v. Launstein*, 635.

10. WATERS, SURFACE—Right to Fill Sag Holes on Dominant Estate.—The owner of the dominant estate may, in the interests of good husbandry, and in the good faith improvement and tillage of his land, fill up sag holes thereon, so that no water will accumulate or stay in them, even if the water arising from rainfall or melting snows should thereby, in natural processes, find its way upon the servient estate and incidentally increase the flow thereon. (Mich.) *Launstein v. Launstein*, 635.

11. WATERS, SURFACE—Artificial Drains.—The owner of the dominant estate cannot, by artificial drains or ditches, collect the water of stagnant pools, sag holes, basins or ponds upon his premises, and cast them in a body upon the proprietor below, to his injury. (Mich.) *Launstein v. Launstein*, 635.

12. WATERS, SURFACE—Right of Dominant Owner—Enlargement of Culvert.—The enlargement of a culvert across a highway, to carry off surface water from the dominant estate, does not injuriously affect the adjacent proprietor, if, in times of high water, the water coming from the dominant estate, which does not find its way through such culvert, will in any event force its way across the highway and upon the lands of the servient estate. (Mich.) *Launstein v. Launstein*, 635.

WEAPONS.

WEAPONS—Offense of Carrying.—A Hack-driver who, with the intent of going armed, carries a pistol in a box under his seat on the hack, is guilty of unlawfully carrying weapons under the statutes of Tennessee. To constitute the offense, it is not necessary that the weapon, unless it is a razor, should be carried concealed about the person. (Tenn.) *Kendall v. State*, 994.

WILLS.

Execution of Will.

1. WILL—Subscription by Mark.—A will may be duly executed by the testator making his mark between the words of his name which were subscribed to the will by the draftsman out of the testator's presence. (Ky.) *Garnett v. Foston*, 456.

2. **A HOLOGRAPHIC WILL** in Which Some of the Figures Composing the Date are printed is not wholly in the handwriting of the testator, and is therefore void. (Cal.) Estate of Plumel, 100.

Revocation of Will.

3. **WILLS—Revocation—Revival by Oral Declarations.**—A will revoked by express declaration contained in a will of later date cannot be revived or vitalized by the destruction of the later will, and oral declarations of the testator before witnesses expressing a desire that the prior will shall stand and that it is the one which he wants executed. (Mich.) Danley v. Jefferson, 640.

Deed and Will Distinguished.

4. **WILLS AND CONVEYANCES, Distinguishing Differences of.**—If an instrument cannot be revoked, defeated nor impaired by the act of the grantor, it is a deed, but if the title of the estate is dependent on his death, he retaining an unqualified power of revocation, it is a will. (Ala.) Griswold v. Griswold, 64.

5. **WILL—Instrument in the Form of a Conveyance.**—If an instrument was intended as a will and not as a deed, it must first be proved and admitted to probate before it can have any operation. (Ala.) Griswold v. Griswold, 164.

Incorporation of Other Writings.

6. **WILLS Referring to and Incorporating Therein Other Documents.**—A will executed in accordance with the requirements of the statute may by appropriate reference incorporate within itself a document or paper not so executed. (Cal.) Estate of Plumel, 100.

7. **WILLS.—To Incorporate Another Paper in a Will,** such paper must be in existence at the execution of the will, and must be referred to therein as an existing paper, so as to be capable of identification. (Cal.) Estate of Plumel, 100.

Codicil and Will.

8. **CODICIL, When Refers to a Will so as to Cure Defects in the Execution of the Latter.**—Where a paper is written on the reverse side of a holographic will, not effectively executed, and is styled "codicil," this word imports a reference to some prior paper as a will, and if executed with the formalities requisite for a will, makes good an invalidly executed holographic will written on such reverse side. (Cal.) Estate of Plumel, 100.

9. **WILL AND CODICIL, Connection of the One with the Other.** Where a paper purporting to be a codicil is executed with the formalities required of a will or imports a reference to some already existing document regarded by the testator as his will, to identify that instrument and to interpret that reference as applying to it, all the surrounding circumstances may be shown. (Cal.) Estate of Plumel, 100.

Testamentary Capacity.

10. **WILLS.—The Standard or Test of Testamentary Capacity** is a matter of law to be defined by the court for the guidance of the jury in reaching a decision in a given case; whether the evidence in the case measures up to that standard is, as a general rule, a matter of fact to be decided by the jury. (Md.) Johnson v. Johnson, 570.

11. **WILLS—Insane Delusion.—To Avoid a Will** because the testator entertained a delusion, the delusion must be an insane delusion,

and the will must be the product thereof. (Md.) *Johnson v. Johnson*, 570.

12. **WILLS.—An Insane Delusion is a Belief in things impossible or, though possible, so improbable under the surrounding circumstances that no man of sound mind could give them credence.** (Md.) *Johnson v. Johnson*, 570.

13. **WILLS—Insane Delusion as to Illegitimacy of Children.—**Where a man wills his entire estate to his children of a former marriage because he believes that his present wife is unfaithful and his children by her illegitimate, which belief has no evidence to support it, the will may be avoided as the product of an insane delusion. (Md.) *Johnson v. Johnson*, 570.

14. **WILLS—Insane Delusion—Evidence of Hostility.—**To prove that a will was the product of an insane delusion on the part of the testator that his wife was unfaithful and their children illegitimate, it is competent to show that he had instituted divorce proceedings. (Md.) *Johnson v. Johnson*, 570.

Probate and Contest of Will.

15. **PROBATE OF WILL, Attack upon, When Collateral.—**When, in response to a petition for distribution, persons appear claiming to be heirs of the decedent and seek to attack the probate of the will on the ground that it is a forgery and that its probate was procured by perjured testimony, praying to have such probate set aside, though the time to appeal therefrom has long passed, this is a collateral and not a direct attack. (Cal.) *Estate of Davis*, 105.

16. **PROBATE OF WILL—Failure to Enter Continuance.—**If notice is given of the time and place of hearing of an application for the probate of a will, the failure to adjourn the hearing from the time fixed to a later day, on which the matter was in fact taken up and disposed of, is at most an irregularity occurring after jurisdiction has been acquired. (Cal.) *Estate of Davis*, 105.

17. **THE PROBATE OF A WILL cannot be Collaterally Attacked** on the ground that after due notice was given of the time and place when the application for probate would be heard, it was not then heard, but was taken up and disposed of at a subsequent time without giving a new notice and without having adjourned the hearing to such subsequent date. (Cal.) *Estate of Davis*, 105.

18. **PROBATE OF WILL—Adjournment of the Hearing of an Application for, When must be Presumed.—**If it appears that due notice was given of the time and place for hearing an application for the probate of a will, and, at a time long subsequent to that so fixed, the court entered an order reciting that the petition came on regularly for hearing, and that it had been proved that notice had been given as prescribed by law, and admitting the will to probate, it must be presumed that orders were made for due adjournment of the hearing to the time when it took place. (Cal.) *Estate of Davis*, 105.

19. **PROBATE OF A WILL—Statute Respecting, When not Unconstitutional as to Nonresidents.—**A statute fixing the time for giving notice of application for the probate of a will will not be declared unconstitutional in its operation against a nonresident on the ground that by existing means of communication between the place of his residence and the place where the notice is given and the application is to be heard, he could not have seen the published notice in time to enable him to appear and oppose the probate on the day set for the hearing, when by the statute he is further given one year from

the probate within which to contest the will. (Cal.) Estate of Davis, 105.

20. THE PROBATE OF A WILL cannot be Set Aside for Fraud in the Procuring of the Jury where the attack is being made collaterally in opposition to an application for distribution. (Cal.) Estate of Davis, 105.

21. PROBATE OF WILL, Effect of on Application for Distribution.—To an application for the distribution of the estate of a decedent the probate of a will is conclusive on all the parties, and persons who, according to the will, have no interest in the estate, are not entitled to be heard, and their pleadings may be stricken out. (Cal.) Estate of Davis, 105.

22. PROBATE OF FORGED WILL, Relief in Equity Against by One not a Party.—An heir at law who does not appear in opposition to the probate of a will alleged by her to have been forged cannot be injured by any fraud practiced at the trial, and therefore cannot obtain relief in equity, where, under the statute, notwithstanding the admission of the will to probate, she had for one year thereafter the right to contest the will on the same ground as before such admission. (Cal.) Tracy v. Muir, 117.

23. PROBATE OF WILL, Notice of Want of, When does not Appear.—In a suit in equity to have the beneficiaries under a will declared trustees of the heirs on the ground that the will was a forgery, averments that the complainant lived in Honolulu at the death of the testator and up to the time of the admission of the will to probate and for a long time thereafter, and that prior to May 1, 1900 (which was nearly three years after such admission), she did not know of the forgery of the will nor of the acts of fraud and conspiracy on which she relies, do not negative knowledge of the admission of the will to probate within a year after it has occurred, during which time she was entitled to contest notwithstanding such probate. (Cal.) Tracy v. Muir, 117.

24. PROBATE OF WILLS, Conclusiveness of.—The determination of the genuineness of an instrument purporting to be a will is solely and exclusively for the court to which the proof of the will is confided, and its decision thereof is final and conclusive, and in the absence of state law, statutory or customary, providing otherwise, not subject to be questioned in any other court, or to be vacated or set aside by a court of chancery on any ground. (Cal.) Tracy v. Muir, 117.

25. RELIEF IN EQUITY Against the Probate of a Will cannot be obtained on the ground of fraud where the party seeking such relief might, notwithstanding the probate, have appeared within a year thereafter and contested the will on the same grounds and evidence as before its admission to probate, and he was not prevented from doing so by the beneficiaries of the will, though he alleged that he did not know that the will was forged until after the year expired. (Cal.) Tracy v. Muir, 117.

26. PROBATE OF A WILL, What is Extrinsic Fraud—Perjured Testimony.—The charge that the admission of a will to probate was due to conspiracy of the beneficiaries and to perjured testimony secured by them and received on the trial of the opposition to such probate does not establish a case of extrinsic fraud. (Cal.) Tracy v. Muir, 117.

27. PROBATE OF A WILL—Statutes Respecting, When not Constitutional as to Nonresidents.—A statute fixing the time for giving notice of application for the probate of a will will not be declared

unconstitutional in its operation against a nonresident on the ground that by existing means of communication between the place of his residence and the place where the notice is given and the application is to be heard, he could not have seen the published notice in time to enable him to appear and oppose the probate on the day set for the hearing, when by the statute he is further given one year from the probate within which to contest the will. (Cal.) *Tracy v. Muir*, 117.

28. CONSTITUTIONAL LAW—What is not Forbidden Discrimination Against Nonresidents.—The fact that the statute relating to the probate of wills requires, in addition to the constructive service provided for, personal notice of the application for the probate of a will to be mailed to or personally served on the heirs of testator resident in the state, but makes no provision for such personal service on nonresident heirs, does not show a forbidden discrimination against such nonresidents violative of the fourteenth amendment to the constitution of the United States. (Cal.) *Tracy v. Muir*, 117.

29. WILL—Appeal from Probate.—A Bond is not Necessary on an appeal from the county to the circuit court in proceedings for the probate of a will. (Ky.) *Garnett v. Foston*, 456.

Competency of Widow to Testify.

30. WILL CONTEST—Competency of Widow to Testify.—In the trial of a caveat to a will filed by the widow of the testator as next friend of their minor children, she is not a party to the case and is a competent witness. (Md.) *Johnson v. Johnson*, 570.

WITNESS.

1. WITNESS.—In an Action by a Divorced Wife against her former husband to recover possession of a note, neither is competent to testify whether it was given for money expended or services performed by him for her. (Ky.) *Johnson v. Johnson's Committee*, 449.

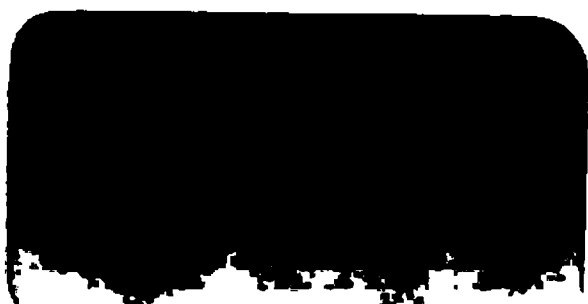
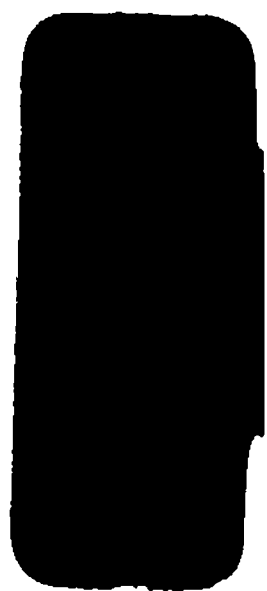
2. WITNESS—Transactions with Decedent.—The assignee of a life insurance policy, who is made a defendant by the administrator suing on the policy, is competent to testify, in behalf of the insurance company, as to transactions with the decedent. (Ky.) *Bromley v. Washington Life Ins. Co.*, 467.

3. TRIAL—Examination of Witness.—How often counsel may be permitted to repeat the same question to a witness to which answer has been made must be left to the discretion of the trial court. (S. C.) *Tucker v. Buffalo Cotton Mills*, 957.

See Criminal Law.

Note.

Witnesses, refusal to testify in a criminal trial is not evidence of the guilt of the accused, 809, 810.





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